Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

WILLIAM THOMAS, *et al.*,

Petitioners,

v.

NETWORK SOLUTIONS, INC. and
NATIONAL SCIENCE FOUNDATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where an executive agency devises, enacts and collects a tax without congressional authorization, and without any intelligible guidelines or principles from Congress to guide or cabin the agency's discretion, may Congress render the agency's unfettered exercise of legislative authority constitutional by passage of a provision deeming the tax "hereby legalized and ratified"?

2. May an executive agency, having entered a congressionally-approved and competitively-bid government contract with a private company to provide to the public registration services that had previously been provided solely by the government, evade the Independent Offices Appropriations Act by secretly "amending" the contract to remove provisions requiring compliance with the Act's cost-based limitations on user fees, thereby permitting the contractor to exact from registrants user fees grossly in excess of those that the agency itself could collect under the Act?

PARTIES TO THE PROCEEDING

The Appellants in the proceeding in the United States Court of Appeals for the District of Columbia Circuit were William Thomas, Myhouse Communications, Russell Braen, Thomas V. Howell, Lightning Links Communications, LLP, Masselli & Lane, Athene, Inc., Sartori Associates, and Delta Micro Systems, Inc.* The Appellees in that proceeding were Network Solutions, Inc. and National Science Foundation.

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* None of the corporate appellants below have a parent corporation, nor does any publicly held company own ten percent or more of their stock.

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CITATION OF OPINIONS AND ORDERS

The order of the United States District Court for the District of Columbia (a) granting summary judgment to Plaintiff-Petitioners holding the "Internet Preservation Assessment" tax unconstitutional; and (b) dismissing their claims that the Internet domain name registration fees violated the Independent Offices Appropriations Act, was reported at 2 F. Supp.2d 22 (D.D.C. 1998) (App. 41a-78a). That court's subsequent August 28, 1998 order holding that Congress' passage of legislation ratified the tax, granting summary judgment to Defendant-Respondent National Science Foundation (NSF) on that issue, and dismissing all of the Plaintiff-Petitioner's remaining claims against Defendant-Respondent Network Solutions, is unreported. (App. 25a-40a). The opinion of the Court of Appeals for the D.C. Circuit (affirming) is reported at 176 F.3d 500 (D.C. Cir. 1999) (App. 1a-24a). On July 8, 1999, the court of appeals' issued an order denying Plaintiff-Appellants' petition for rehearing en banc, and another order denying rehearing by the panel, which were not reported. (App. 93a-94a-2).

BASIS FOR JURISDICTION IN THIS COURT

The orders of the court of appeals denying the petition for rehearing en banc, and also denying rehearing by the panel, were filed on July 8, 1999. (App. 93a-94a-2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition involves the Independent Offices Appropriation Act, 31 U.S.C. § 9701 ("IOAA") (App. 95a-

96a), and Section 8003 of the Fiscal Year 1998 Supplemental Appropriations and Rescissions Act, Pub. L. No. 105-174, 112 Stat. 58 (App. 97a-99a).

STATEMENT OF THE CASE[1]

This petition raises two fundamental issues going to the core of the authority of two branches of the federal government, Congress and executive agencies.

The first issue is whether Congress may retroactively "undo" or correct, by ratification, the violation of separation-of-powers inherent in NSF's levying of a tax not only without congressional authorization, but also without congressionally-established intelligible guidelines to guide or cabin NSF's discretion. The opinion below avers that Congress can do so, simply by approving, after the fact, the specific amount and purpose of the tax that NSF legislated and imposed. If the opinion below is correct, there is no meaningful separation-of-powers limitation on a federal agency's executive authority; it may legislate at will, and the outcomes of such executive legislation, if politically expedient, can simply be given a congressional rubber stamp. These propositions are squarely in conflict with the Court's consistent reaffirmance of the separation-of-powers principles underlying the nondelegation doctrine, and this case presents the opportunity to clarify the scope and viability of the doctrine now.

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1. Subject matter jurisdiction in the district court was based on diversity (28 U.S.C. § 1332(a)), and, for the issues addressed in this petition, federal question jurisdiction (28 U.S.C. §§ 1331 and 1367), based on the Registrants' claims brought under the Constitution and the IOAA.

The second issue is whether an executive agency may circumvent the user-fee constraints of the IOAA by licensing a government contractor to charge, collect, and keep user fees so greatly above cost that they amount to profits in the tens or hundreds of millions of dollars — all for a service increasing exponentially in demand, yet which the public can obtain from no other source. The opinion below permits that extraordinary result, and thereby permits the Government to accomplish a statutorily prohibited result merely by contracting it out. The Court's resolution is warranted and necessary to prevent executive agencies from doing indirectly what the IOAA forecloses the agency from doing directly.

This case has arisen from the complexities involved in the administering of the Internet, some of which warrant brief explication as a backdrop to this action's procedural history. Petitioners, who are "Registrants" of "domain names" on the Internet, brought this action to challenge the legality of the charges that NSF authorized Network Solutions to collect for the registration and renewal of domain names. A "domain name" is a unique address that allows a registrant to set up and maintain a "web site" on the Internet, where the registrant can post information or conduct business with other users of the Internet who choose to "visit" that web site.[2] Without that unique address, it is impossible to set up and maintain a web site. Without a registration from Network Solutions, it is impossible to obtain a domain name in the ".com" or other top-level domains for which Network Solutions is the gatekeeper.

Pursuant to their original cooperative agreement let under competitive bidding, NSF contracted with Network

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2. *See generally*, *Thomas*, 176 F.3d at 502-06 (App. 1a-10a).

Solutions to act as the sole and exclusive authority for registering new top-level (*e.g.*, ".com") domain names on the Internet. All of Network Solutions' authority was ceded to it by NSF. Moreover, Network Solutions was to be paid by the government on a cost-plus-fixed-fee basis, with no charge to registrants. Anyone seeking a domain name had nowhere to turn but to Network Solutions.

In the event that user fees were later authorized, Article 15 of the Cooperative Agreement provided that, "[i]f, and to the extent that Awardee is authorized and/or directed to charge and collect user fees for the Registration Services provided hereunder, any user fees so collected . . . *shall be used to defray . . . expenses. . . .*" (App. 124a) (emphasis added). In 1995, NSF and Network Solutions decided between themselves, and without Congressional approval, to *delete* this provision from the Cooperative Agreement, and to replace it with an "amendment" authorizing Network Solutions to collect directly from registrants a one-time registration fee of $100 for the first two-year period, and $50 per year thereafter.

Under that 1995 "Amendment 4" (App. 131a-135a), Network Solutions was allowed to keep 70 percent of the fees it collected from registrants "as consideration for the services provided." (App. 131a). Network Solutions was to place the remaining 30 percent in a custodial account, held on behalf of NSF, for the purpose of "preservation and enhancement of the 'Intellectual Infrastructure' of the Internet." (App. 131a-132a). This set-aside was referred to as the "Preservation Assessment." *Id.*

A. The "Preservation Assessment"

Registrants challenged the Preservation Assessment as an unlawful tax imposed upon them by NSF without prior

authority. The district court agreed, holding it to be an unconstitutional tax. *Thomas*, 2 F. Supp. 2d at 31-32 (App. 57a-59a).

Subsequently, Congress enacted Section 8003 of the Fiscal Year 1998 Supplemental Appropriations and Rescissions Act, Pub. L. No. 105-174, 112 Stat. 58 (App. 97a-99a). *Thomas*, 176 F.3d at 505-06 (App. 8a-10a). Section 8003 purported to ratify the 30 percent portion of the "fee" charged by Network Solutions for domain name registrations that was dedicated to NSF's "Intellectual Infrastructure/Preservation Assessment." (App. 97a-98a). Section 8003 stated that the "fee" was "hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed." *Id.*

After the enactment of Section 8003 into law, the district court dismissed the Registrants' claim as moot, holding that the Congressional action effected a valid ratification of the previously unconstitutional tax. (App. 39a-40a). The Registrants argued, in their appeal to the D.C. Circuit, that the tax was fatally flawed from its inception, as Congress could not have delegated to NSF, in the first place, the unfettered authority to do what NSF did — which was to impose a tax without reference to any "intelligible principles" to confine or guide its discretion. The Registrants thus contended that the Preservation Assessment could not be made lawful by ratification, as an after-the-fact congressional approval of the *result* of NSF's legislative act is no substitute for the authorization and "intelligible principles" required to be in place at the time the agency acted.

In affirming, the D.C. Circuit panel framed the delegation issue as follows: "whether Congress could have

authorized NSF to collect the assessment from the beginning (if it could not have done so, it cannot ratify NSF's actions after the fact)." *Thomas*, 176 F.3d at 507 (App. 14a) (citing *United States v. Heinszen & Co.*, 206 U.S. 370 (1907)). The panel then stated its two-pronged basis for rejecting the Registrants' delegation analysis: "We think registrants' argument miscasts not only what Congress did, but also what Congress could have done initially." *Thomas*, 176 F.3d at 507 (App. 14a).

In proceeding to discuss the first prong ("what Congress did"), the panel suggested that Congress' passage of Section 8003 did not implicate delegation concerns at all, because the ratification measure Section 8003 *itself* did not delegate anything:

> Section 8003 delegated to NSF no discretionary authority, much less the power to enact tax legislation or to fix tax rates. When Congress passed this provision in May 1998, the rate had already been set, the assessments already collected.

Id.

On the critical second prong ("what Congress could have done"), the panel declined to consider whether, in the first instance, Congress could have authorized NSF to take the unfettered legislative action that NSF did, in fact, take in *enacting* the Preservation Assessment tax. Instead, the panel — like the district court — concluded that the pivotal question was whether Congress, before the fact, could have authorized NSF to make a *specific collection for a specific purpose* (which, of course, Congress could have directed NSF to do):

> If a prior act of Congress had directed NSF to collect $30 for each new registration and $15 thereafter and to retain the funds in order to support the Internet, we perceive no reason — registrants have offered none — why *such legislation* would not have been within Congress's constitutional power under Article I, § 8.

Id. (emphasis added).

In their petition for *en banc* review, the Registrants argued that the panel had misconceived the delegation issue, as it requires prospective consideration of what NSF set out to do (legislate a tax), not retrospective consideration of the acceptability of the result NSF actually achieved ("$30 for each new registration and $15 thereafter . . ."). The circuit court declined to grant *en banc* review.

B. The (70%) "User Fees"

The district court itself stated that

> [I]t concerns me that NSF can handle what they call this Cooperative Agreement without any type, it seems to me, of controls or ability for the people that wish to use the Internet and reserve domain names or have a domain name *to challenge the fees that may greatly exceed the real cost.*

March 17, 1998, Hearing Tr. at 29-30 (emphasis added). In its subsequent decision, the district court conceded that "[p]laintiffs make a strong showing that NSI is reaping a substantial profit in excess of its cost." *Thomas*, 2 F. Supp.

2d at 37 (App. 74a). As the Registrants showed, NSI's cost of registration is a fraction of *one dollar*; the fee NSI charges is seventy dollars. *See* Sartori Aff. ¶ 7 (App. 137a).

The Registrants contended below that IOAA applied to these user fees collected by Network Solutions, because *inter alia* the IOAA itself contemplated that such government-authorized "licenses" and "registrations" fell within its purview. The fees were authorized by a federal agency for the providing of a government service; Network Solutions had no authority whatsoever over the domain name registry until NSF *conferred* that authority upon it by means of the Cooperative Agreement in general (App. 110a-124a) and "Amendment 4" in particular (App. 131a-135a). Indeed, Network Solutions admitted the authority and control of NSF in defending itself against an antitrust lawsuit in federal district court in New York:

> Some or all of the claims alleged . . . are barred . . . because Network Solutions was and is *acting in accordance with the directives of an agency of the United States government* that possessed and continues to possess actual or apparent *authority to give such directives to Network Solutions*.[3]

The opinions of the district court and the court of appeals below focused not on the executive agency controlling and authorizing the domain name registration process, however, but on the private status of the agent NSF contracted with to provide it. This error of form over substance — exempting

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3. *See* Network Solutions' Answer To The Second Amended Complaint of PG Media, Inc., 11/7/97, in *PG Media, Inc. v. Network Solutions, Inc.*, 97 Civ. 1946 (RPP) (S.D.N.Y.) (emphasis added).

Network Solutions' NSF-sponsored monopoly profits from the IOAA on the grounds that Network Solutions is not an agency — exempts from statutory controls the very kind of user fees for which they were intended, and for which they are most needed.

The district court reasoned that the registration/renewal fees "are payments to cover costs and profits for NSI, the entity that provides the services," and therefore "NSI can charge a market rate." *Thomas*, 2 F. Supp. 2d at 35-36. (App. 70a-71a). On appeal, the Registrants pointed out that the "market rate" finding was demonstrably inaccurate; the district court itself had obtained the concession from NSF's counsel, during oral argument, that there was *no limit* facing or confining NSF when it set the amounts for registration/ renewal. Further, the fees collected by Network Solutions bear no relation to its costs, as shown by the massive, exponentially-increasing windfall profits that Network Solutions has accumulated. In addition, as shown by two cited decisions of the Comptroller General, a federal agency must ensure that its fees not exceed IOAA limitations, whether they are charged by the agency directly, or indirectly through a private company.[4] The Registrants also argued that the district court's refusal to consider domain name registration a "government service" is irreconcilable with Network Solutions' claim of antitrust immunity on the ground that it is a *federal instrumentality*, and with its self-description as carrying out "a public purpose of support of stimulation" on NSF's behalf.

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4. *See In the Matter of Federal Election Commission — Sales of Microfilm Copies of Candidate and Committee Reports*, 61 Comp. Gen. 285, 1982 WL 26592 (C.G., March 1, 1982) (App. 105a-109a); *Matter of Retention of Fees Received By EPA Contractors Providing Information Services To The Public*, 1975 WL 7967 (C.G. Oct. 20, 1975) (App. 100a-104a).

The D.C. Circuit affirmed, similarly reasoning that domain name registration does not become a "government service . . . [s]imply because NSF *might have been able* to perform [it]" — even though, at all times relevant, these services could not be performed by anyone but NSF, without NSF's express authorization. *Thomas*, 176 F.3d at 511 (App. 22a) (emphasis added). The panel also disregarded applicable Comptroller General decisions, on the ground that they involved "services that statutes required the agencies to perform," while no such statute *required* NSF to perform domain name registration. *Id.* (App. 23a). Finally, the panel found the IOAA inapplicable on the ground that it applies only to monies bound for the federal treasury, and that NSF's allowing Network Solutions to keep all of the user fees therefore exempts them from the IOAA. *Id.* ("[t]he company is under no duty to turn over any portion to the federal government.") *Id.* (App. 24a).

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW CONFLICTS WITH THIS COURT'S DECISIONS FORBIDDING LEGISLATIVE ACTION BY AN EXECUTIVE AGENCY IN THE ABSENCE OF INTELLIGIBLE PRINCIPLES FROM CONGRESS TO GUIDE AND CONFINE THE AGENCY'S DISCRETION.

The Registrants' petition for writ of certiorari should be granted because the opinion below conflicts with this Court's decisions confirming the vitality of the nondelegation doctrine and the separation-of-powers principles that it embodies. The opinion below goes far beyond any prior

decision of this Court authorizing retroactive ratification of an unconstitutional tax. It authorizes retroactive ratification of an unconstitutional tax even where Congress would not have authorized the agency to act in the way it did in the first place. Therefore, the decision is nothing less than a nullification of fundamental constitutional requirements, and it should not be passed over.

The Constitution provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States." Article I, § 1. The Court has applied and enforced that principle through the nondelegation doctrine, whose purposes were described by Chief Justice Rehnquist:

> As formulated and enforced by this Court, the nondelegation doctrine serves three important functions. First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. [Citations omitted.] Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. [Citations omitted.] Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards. [Citations omitted.]

Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring).

In keeping with these purposes, the Court's decisions have long required that Congress' delegating of legislative authority to an executive agency be accompanied by intelligible guidelines or principles to cabin the agency's discretion:

> If Congress shall lay down by legislative act an intelligible principle to which the (President) is directed to conform, such legislative action is not a forbidden delegation of legislative power.

F.E.R.C. v. Algonquin SNG, Inc., 426 U.S. 548, 559 (1976), *quoting Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). In order for a particular delegation to pass constitutional muster, Congress must provide the agency "with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed.' " *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (citations omitted); *see also American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.").

As the foregoing decisions of this Court make clear, the constitutional validity of an agency's exercise of legislative action — insofar as separation-of-powers is concerned — has nothing to do with the result achieved by the agency's action. Rather, it depends on whether the constitutionally-required protections — "intelligible principles" — *were in place when the agency performed its legislative act*, such that a reviewing court could determine whether the will of

Congress has been obeyed. *Skinner*, 490 U.S. at 218. (If not, the agency action is unconstitutional, no matter if Congress approves afterward of the result.) This requirement ensures that the most politically-accountable branch — Congress — sets the country's policies, which the executive branch must execute and implement pursuant to intelligible principles provided to it by Congress. A court confronted with a challenge to agency action on nondelegation grounds must therefore consider carefully whether Congress had put in place any such intelligible principles or standards when the agency undertook the challenged action.

The panel below sidestepped the issue. It did so by presupposing the existence of a particular result — i.e., an assessment with the same amount and purpose of the Preservation Assessment — and asked merely whether Congress itself could have legislated it. *Thomas*, F.3d at 507 (App. 14a-15a). (The answer to that misconceived question will always be yes.) The reasoning is circular: NSF's enactment of the Preservation Assessment must have reasonably effectuated Congress' intent because Congress did in fact ratify it. The opinion below thus stands for the proposition that whatever Congress does is self-justifying from a separation-of-powers standpoint, which renders the nondelegation doctrine altogether meaningless. As such, the opinion below does not merely conflict with the foregoing decisions of this Court; it is irreconcilable with them.

Nor does the opinion find support in the Court's readily-distinguishable *Heinszen* decision (upon which the district court heavily relied). In *Heinszen*, the Court upheld Congress' ratification of tariff duties for the Philippine Islands that had been established by the President without Congress' authorization. *Heinszen*, 206 U.S. at 384. But the

congressional ratification in *Heinszen* merely solved a technical drafting error; Congress had provided guidance to its delegatee and had attempted to provide authority before the duties had been imposed. NSF had no such congressional guidance here. It simply acted on its own pursuant to its objectives and purposes. Congress stepped in only to capture the benefits of funds that had already been collected, and that therefore was politically "free."

Furthermore, where the executive branch action in question is (as here) that of an executive agency, the importance of and need for judicial review is greater than for Presidential exercises of discretion (as in *Heinszen*), because the President himself is elected and thus "responsible to the voters, who, in principle, will judge the manner in which he exercises his delegated authority." *Clinton v. City of New York*, 118 S. Ct. 2091, 2128 (1998) (Breyer J., dissenting), *citing Dalton v. Specter v. Specter*, 511 U.S. 462, 476 (1994) (due to President's power "to approve or disapprove the [military base closure] recommendations as he sees fit," President's decision not reviewable); *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (stating that it was "important to the integrity of the process" that the decision whether to transmit census report to Congress was made by the President, a "constitutional officer," as opposed to the unelected Secretary of Commerce).[5]

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5. The district court's contention that nullification of Section 8003 as a ratification measure would somehow foreclose all ratifications of taxes (App. 37a) is rebutted by a decision cited by the district court itself (*see* App. 29a), *Canisius College v. United States*, 799 F.2d 18 (2d Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987), in which a tax *imposed by Congress* (quite unlike the agency-legislated tax here) held by the Supreme Court to be unlawful was

(Cont'd)

The opinion below disregards the important structural considerations that justify the nondelegation doctrine. Congress in the first instance must discharge its responsibility to deliberate on public policy (including in its exercise of the taxing authority), and to provide guidance to those executing the policy. This concern is heightened when the entity executing the law is a private commercial enterprise, Network Solutions. To allow Congress the politically expedient alternative of accepting the financial fruits of an executive branch actor's unauthorized and unilateral action is to provide Congress a way to shirk its political obligation, and the executive branch a mechanism to aggrandize its power and influence.

Heinszen thus cannot be construed to support Congress' power to delegate to the National Science Foundation the unfettered authority to legislate a tax. While the Court's majority opinion in *Clinton* did not reach the delegation issue — (thus leaving in place the opinion below holding the line item veto unconstitutional under the nondelegation doctrine) — Justice Kennedy stressed in his concurring opinion that:

> Liberty is always at stake when one or more of the branches seek to transgress the separation of powers . . . if a citizen who is taxed has the *measure of the tax or the decision to spend*

(Cont'd)
subsequently ratified. *See also Rafferty v. Smith, Bell & Co.*, 257 U.S. 226, 232-33 (1921) (retroactively approving taxes imposed by the Philippine Legislature); *Porto Rico Brokerage Co. v. United States*, 23 C.C.P.A. 259, 264-65, 80 F.2d 521, 524 (C.C.P.A.) (retroactively approving taxes imposed by the Legislature of Puerto Rico), *cert. denied*, 298 U.S. 671 (1936). The Registrants' position is not at odds with any of these decisions, nor with *Heinszen*.

> determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened.

Clinton, 118 S. Ct. at 2109 (emphasis added).

NSF went even beyond those concerns here; it literally *invented* the tax, in addition to imposing it, fixing its measure, and deciding how it would be collected and spent. If an agency can do that, and Congress can ratify it, there is no constitutional limit on the extent to which agency may legislate in the first instance. Agencies can devise, impose and collect whatever taxes they deem necessary. Should a tax be challenged as "unauthorized," the only concern is a pragmatic one: whether the agency's partisians can convince Congress of the usefulness of the already-collected funds. If Congress likes one such tax and does not like several others levied by one or more agencies, Congress can simply "ratify" the one it likes.

That scenario is not far from what happened here, and it violates the Constitution. In the absence of any legislative guidance from Congress at the time NSF enacted the tax, a court has no yardstick for determining whether any "adequate control" has been exercised by Congress, or whether "the will of Congress has been obeyed." *See Skinner*, 490 U.S. at 218. Even if the criteria applied by the agency in its legislative act happen to be reasonable or defensible, they do not pass muster under the nondelegation doctrine if they are not informed by congressionally-determined intelligible principles or standards. And it is uncontested here that there were no principles, no guidance, and no standards of any kind *articulated by Congress* that informed NSF's original decision to devise and impose the tax, by which $30 out of

every $100 collected from domain name registrants was set aside for Internet "preservation and enhancement."

In the absence of any legislative guidance from Congress at the time NSF enacted the tax, a court has no yardstick for determining whether such "adequate control" has been exercised by Congress, or whether "the will of Congress has been obeyed." *See Skinner*, 490 U.S. at 218. Even if the criteria applied by the agency in its legislative act happen to be reasonable or defensible, they do not pass muster under the nondelegation doctrine if they are not informed by congressionally-determined intelligible principles or standards. And it is uncontested here that there were no principles, no guidance, and no standards of any kind *articulated by Congress* that informed NSF's original decision to devise and impose the tax, by which $30 out of every $100 collected from domain name registrants was set aside for Internet "preservation and enhancement."

The message of the lower court's decision for Congress and agencies is clear and disturbing. Congress can duck tough political questions — such as whether to tax particular activities — and allow unelected bureaucrats unfettered discretion to legislate. If the results work to the government's favor (or to perceived political advantage) — by, for example, providing a source of revenue in times of proclaimed fiscal austerity — Congress can quietly slip a ratification in an omnibus bill late one evening (which is exactly what happened here). Agencies are thus encouraged to tax, in the hope that some of their assessments might be rubber-stamped after collection. Moreover, in allowing Congress to determine the lawfulness of the Preservation Assessment via Section 8003 (which deems the tax "hereby legalized" by ratification), the opinion below further offends separation-

of-powers principles by effectively taking from the judiciary, and ceding to Congress, decision-making authority as to the lawfulness of unauthorized agency action.

This case presents the court not only with the urgent need to enforce separation-of-powers principles, but to further define their scope and application. Accordingly, the Petitioners respectfully submit that their petition should be granted.

II.

THE OPINION BELOW, WHICH EXEMPTS FROM STATUTORY CONSTRAINTS EXECUTIVE AGENCY ACTION ACCOMPLISHED THROUGH AN AGENT, PRESENTS AN ISSUE OF OVERRIDING IMPORTANCE IN ITS ABROGATION OF AGENCY ACCOUNTABILITY.

The implications of the court of appeals' failure to apply the IOAA to the NSF-sponsored user fees are unmistakable, and resonate far beyond the confines of that particular error. Not only does the opinion below permit an agency to disregard the statutory constraints upon its power whenever it decides to act through a private agent; it also implicitly condones the agency's and the contractor's covertly hatching a private deal to remove from their government contract a particular provision holding any user fees to limits consistent with the IOAA — after which they proceed to impose user fees grossly in excess of the costs of the service provided.[6]

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6. *See Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1180 (D.C. Cir. 1994) ("[a]n agency may not charge more than the reasonable

(Cont'd)

In approving by its inaction this extraordinary scheme, the opinion below conflicts directly with the Court's confirmation that an executive agency may not expand its authority "beyond its customary orbit" in imposing user fees. *See National Cable Television Ass'n v. United States* (*NCTA I*), 415 U.S. 336, 341 (1974); *see also Ayuda, Inc. v. Attorney General*, 848 F.2d 1297, 1299 (D.C. Cir. 1988), for the proposition that "the [IOAA] statute by its express terms sweeps with considerable breadth."). It is difficult to imagine anything further beyond the "customary orbit" of an executive agency than colluding with its contractor to delete contractual provisions requiring *the contractor* to adhere to cost-based user-fee requirements that track those in the IOAA — and then "amending" the contract to set by fiat user fees grossly in excess of those IOAA-based limits, all without recourse by any registrant.[7] The issue of

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cost it incurs to provide a service, or the value to the recipient, *whichever is less*" (emphasis added)); *Seafarers Int'l Union of North Am. v. United States Coast Guard*, 81 F.3d 179, 185 (D.C. Cir. 1996) ("[i]n short, the measure of the fees is the cost to the government of providing the service, not the intrinsic value of the service to the recipient.").

7. There can be little question that the IOAA would forbid NSF from collecting the fees at issue, both because the fees dwarf the cost of the service provided (*see* Sartori Aff. ¶ 7 (App. 137a), and because the registration services themselves fall within the statute's scope. The original version of the IOAA, 31 U.S.C. § 483(a) — the predecessor to 31 U.S.C. § 9701 — defined "service or thing of value" as "any work, service, publication, report, document, benefit, privilege, authority, use, franchise, *license, permit, certificate, registration or similar thing of value or utility* performed, furnished, provided, granted, prepared, or issued." *See History: Ancillary Laws*

(Cont'd)

overriding importance is, then, whether an executive agency is free to exercise unbridled power so long as it does so through an agent.

The opinion below completely disregards the glaring defect here: NSF, by permitting Network Solutions to charge and keep monopoly, has accomplished through its agent what NSF itself was precluded from doing under the IOAA. The issue for the Court goes beyond the applicability of the IOAA under the formalistic "government service" analysis used by the court of appeals (*see Thomas*, 176 F.3d at 510-11 (App. 20a-24a)), or the "service provided by an agency" analysis relied on by the district court (*see Thomas*, 2 F. Supp.2d at 36 (App. 71a-72a)). It is, rather, the more fundamental question of whether an executive agency may, with impunity, authorize an agent to impose on or exact from the public something that Congress has expressly forbidden the agency from doing itself.

Professor Richard B. Cappalli[8] has framed the issue succinctly:

(Cont'd)
and Directives to 31 U.S.C. § 9701 (emphasis added). The streamlined definition that replaced it ("service or thing of value") was substituted not for any substantive reason, but simply "for consistency and to eliminate unnecessary words." *Id.*; *see also Seafarers Int'l Union*, 81 F.3d 179 at 189-90 (Henderson, J., concurring opinion) (noting that "*fees for licenses and registrations are 'classic examples' of user fees*" subject to the IOAA, and holding that Coast Guard's merchant marine "licensing program" is "service or thing of value" under IOAA) (citation omitted).

8. Professor Cappalli is the author of, *inter alia*, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS: LAW, POLICY AND PRACTICE (Callaghan 1982).

> Imagine a Gun Control Agency ("GCA") whose job it is to control illegal trafficking in firearms. GCA could not enter homes without search warrants because of the Fourth Amendment; it could not become a drug "czar" because such would exceed its statutory authority; it could not make profits by charging huge fees for firearm permits because of statutory fee controls; and it could not create its own budget and its own grant program by generating sufficient income-producing activities to free itself from legislative appropriation and authorization controls. Noticing that the cooperative agreement instrument allows "substantial involvement" of the donor agency, GCA decides to create a for-profit "branch," GCA, Inc., by means of a cooperative agreement. This alter ego, this "shadow" government, then does everything GCA cannot do because of legal limits on agency action with GCA controlling GCA, Inc.'s every move by means of conditions in the cooperative agreement and constant monitoring. Can there be any doubt that this evasive technique is illegal and that the artificial distinction between GCA and GCA, Inc. must be collapsed?

Cappalli Decl. ¶ 10 (App. 145a).

It is telling that neither the district court nor the court of appeals was willing to collapse the similarly-artificial distinction here, notwithstanding the extraordinary circumstances involved in the "amending" of the government contract to authorize the Preservation Assessment tax for NSF and the exorbitant fees for Network Solutions. The

district court, at least, admitted its concern over the apparent lack of any "controls" over NSF, coupled with the absence of recourse by registrants "*to challenge the fees that may greatly exceed the real cost.*" March 17, 1998, Hearing Tr. at 29-30 (emphasis added).

These concerns go to the heart of the case, and to the importance of it. When NSF and Network Solutions deleted the IOAA-based provision and inserted their "amendment" permitting the fees at issue, the agency and its agent succeeded in getting rid of the safeguards that had been built into the original competitively-bid and congressionally-authorized government contract. There was no competitive bidding to provide the registration service. There was no public notice or opportunity for comment.

The court of appeals, however, goes so far as to regard Network Solutions' amassing of monopoly profits under the "amended" contract as a self-justifying indication that nothing is wrong, because, essentially, there is nothing in the contract that anyone can point to requiring Network Solutions to put those above-cost accumulations into the U.S. Treasury. *See Thomas*, 176 F.3d at 511 (App 23a-24a). It is extraordinary in itself for a court to find justification for exempting Network Solutions' profits from the IOAA, when those profits are the calculated result of NSF and Network Solutions *deliberately circumventing the IOAA* in the course of their "amending" the contract. Similarly, it is cold comfort to the Registrants to suggest that they can legitimately be charged Internet domain name registration charges that are 10 (or even 50) times higher than the permissible amount under the IOAA-based original contract, so long as Network Solutions gets to keep all of their money to itself.

Something is seriously wrong, and the court of appeals' reasoning reflects it. The "enrichment" justification is as misplaced as the court of appeals' conclusion that only services that NSF is required by statute to provide fall within the IOAA. *See Thomas*, 176 F.3d at 510-11 (App. 20a-24a). But again, it is precisely those exercises of power that fall outside statutory direction, and *beyond* the agency's "customary orbit" — like NSF's wielding of control over domain name registration — in which Congress' ability to constrain executive agencies' powers through enforcement of the IOAA (and statutes like it) assumes critical importance.

It is undisputed that there is *nowhere else a Registrant can go* but to NSF's sole agent, Network Solutions, to gain access to the most well-traveled and significant "lane" on the information superhighway: the ".com" domain (or, for that matter to gain access to other top-level domains, ".org" and ".net"). Thus, while the Internet itself may be undergoing commercialization and deregulation, the registration of ".com" domain names is and always has been a quintessential government service, just as the licensing of wavebands and channels is a government function notwithstanding the increasing commercialization and deregulation of television, cable and radio.

As new technologies are developed, government regulation will necessarily extend in new directions. But government regulation remains subject to statutory constraints, including the IOAA. If government agencies are allowed to sidestep those constraints by the simple expedient of delegation of their function to private agents, the constraints will become meaningless.

As shown by the opinions of both courts below, the more "adventurous" agencies become in extending their orbits of

power through use of agents, the less likely it is that courts will hold them to traditional statutory safeguards. In the absence of guidelines from this Court *identifying* boundaries of permissible agency action with respect to new or rapidly-evolving areas of technology, objectives that would be unlawful if done by the agency are likely, as here, to be condoned by courts finding a "nonfit" with the IOAA or other statute. Intervention by the Court is thus of critical importance not just to hold NSF and Network Solutions accountable for the unauthorized agency action here, but also to deter similar abuses in the future.

This petition should therefore be granted, so that the Court may establish that executive agencies and the parties they contract with to render services obtainable nowhere else are not at liberty to create, on their own and without recourse by the public or oversight from Congress, a safe harbor from the protections to which the public is entitled in government contracting, or from statutory constraints upon user fees that the agency itself may charge or collect.

CONCLUSION

For the reasons stated, Petitioner-Registrants respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: October 6, 1999

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED AND DECIDED MAY 14, 1999

William THOMAS, et al., Appellants,

v.

NETWORK SOLUTIONS, INC. and National Science Foundation, Appellees.

No. 98-5502.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 25, 1999.

Decided May 14, 1999.
Rehearing and Rehearing En Banc Denied
July 8, 1999.

* * *

Before: RANDOLPH, ROGERS, and GARLAND, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

This is an appeal from the judgment of the district court dismissing a complaint filed against the National Science

Foundation ("NSF") and its private contractor, Network Solutions, Inc. Plaintiffs are individuals and entities who registered Internet domain names through Network Solutions, Inc., paying a one-time registration fee and yearly renewal fees thereafter, a portion of which the company paid over to NSF according to the terms of a government contract. The complaint alleged, among other things, that NSF had imposed and collected an unconstitutional tax, that Network Solutions had violated the antitrust laws, and that the amount of the fees charged pursuant to the contract exceeded a limitation imposed by statute.

I

A

The Internet, "an international network of interconnected computers," Reno v. ACLU, 521 U.S. 844, 117 S.Ct. 2329, 2334, 138 L.Ed.2d 874 (1997), developed from the ARPANET, a network the United States military created in 1969 to link its computers with those of defense contractors and universities. See 63 Fed.Reg. 31,741 (1998). The ARPANET, which no longer exists, served as a model for similar nonmilitary networks. See id.; see also 63 Fed.Reg. 8826 (1998). These networks eventually linked with each other and coalesced into the backbone of the modern Internet, see 63 Fed.Reg. at 8826, enabling tens of millions of people to communicate with one another and to gain access to vast amounts of information from around the world, see ACLU, 117 S.Ct. at 2334.

Appendix A

Internet use has grown dramatically in the past two decades. The number of networked "host" computers — those that store information and relay communications — increased from about 300 in 1981 to approximately 9.4 million in 1996. See id. Roughly 60 percent of these host computers are located in the United States. See id. About 40 million people used the Internet in 1996, a number expected to rise to 200 million this year. See id.

Individuals generally obtain access to the Internet through these host computers, each of which has a numerical address, or Internet Protocol number, such as "98.37.241.30," that allows other host computers to identify and locate it.[1] See 63 Fed.Reg. at 8826; see also 63 Fed.Reg. at 31,741. When the Internet was in its infancy, Internet Protocol numbers were assigned and maintained by the late Dr. Jon Postel, then a UCLA graduate student working under a contract between the Defense Department and the university. See 63 Fed.Reg. at 31,741. When Dr. Postel moved from UCLA to the Information Sciences Institute at the University of Southern California, he continued to maintain the lists

1. An Internet Protocol address consists of four numbers, each between 0 and 255, separated by periods. See PGMedia, Inc. v. Network Solutions, No. 97 Civ. 1946 RPP, slip op. at 3, 1999 WL 144494 (S.D.N.Y. Mar. 16, 1999); see also Josh A. Goldfoot, Note, Antitrust Implications of Internet Administration, 84 VA. L. REV. 909, 913 (1998). The first number signifies the computer's geographic region; the second number a specific Internet Service Provider; the third a specific group of computers; and the fourth a specific computer within that group. See G. Peter Albert, Jr., Eminent Domain Names: The Struggle to Gain Control of the Internet Domain Name System, 16 J. MARSHALL J. COMPUTERS & INFO. L. 781, 784 (1998).

pursuant to contracts with the Defense Department. See id. As the lists grew, Dr. Postel delegated certain aspects of the list maintenance to what eventually became known as the Internet Assigned Numbers Authority. See id.

Because many numerical sequences are difficult to remember, the Internet community created a system allowing an Internet computer to be identified by a "domain name." See 62 Fed.Reg. 35,896 (1997). The domain name system is a hierarchy. See 63 Fed.Reg. at 8826. Top-level domains are divided into second-level domains, and so on. See id. More than 200 national, or country-code, top-level domains — e.g., ".us" for the United States, ".pa" for Panama, ".uk" for the United Kingdom, and so on — are administered by their corresponding governments or by private entities with the government's permission. See 63 Fed.Reg. at 31,742. A small set of generic top-level domains carry no national identifier, but denote the intended function of that portion of the domain space: ".com" for commercial users; ".org" for non- profit organizations; ".net" for network service providers; ".edu" for educational institutions; ".gov" for United States government institutions; ".mil" for United States military institutions; and ".int" for international institutions. See 63 Fed.Reg. at 31,742.

Domain names — e.g., bettyandnicks.com — consist of at least two groups of alphanumeric characters, each known as a string, separated by a period or dot. The last string — the farthest to the right — denotes the top-level domain. The second-to-last string is the second-level domain name and identifies the person's or organization's Internet computer site. See Albert, supra note 1, at 783. Each string may contain

up to 63 characters but the overall domain name must be less than 256 characters. See PGMedia, Inc., No. 97 Civ. 1946 RPP, slip op. at 3.

For the domain name system to function, each domain name must be unique and correspond to a unique Internet Protocol number. See 63 Fed.Reg. at 8826; see also Goldfoot, supra note 1, at 913. A new user who wishes to have an Internet site with a domain name address first obtains an Internet Protocol number (e.g., 1.23.456.7). See PGMedia, Inc., No. 97 Civ. 1946 RPP, slip op. at 5. The user then registers a domain name and it becomes linked with that Internet Protocol number. See id. at 5-6.

Before using a domain name to locate an Internet computer site in "cyberspace," a computer must match the domain name to the domain name's Internet Protocol number.[2] The match information is stored on various Internet-connected computers around the world known as domain name servers. The computer attempts to find the match information by sending out an address query.[3] The goal of the address query is to find the particular domain name server containing the match information the user seeks. See id. at 4-5.

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2. A domain name does not signal where a computer is physically located. A computer may be moved from one place to another while retaining the same domain name. Thus a domain name is not an address as typically understood but instead is a mark identifying a specific person's or organization's site on the Internet. See Albert, supra note 1, at 785.

3. A computer user typically initiates an address query by typing a domain name into an application such as a web browser. See Albert, supra note 1, at 785.

Appendix A

When ordered to translate an unknown domain name into an Internet Protocol number, a computer will ask its Internet Service Provider's server if it knows the domain name and corresponding Internet Protocol number. See Albert, supra note 1, at 785. If that server lacks the information, it will pass the query to a "root server," also called a "root zone" file, the authoritative and highest level of the domain name system database.[4] See 63 Fed.Reg. at 8826. The root zone file directs the query to the proper top-level domain zone file, which contains the domain names in a given domain and their corresponding Internet Protocol numbers. See 63 Fed.Reg. at 8828. In the case of someone searching for the "bettyandnicks.com" home page, the root zone file sends the query to the top-level domain zone file with information about ".com" domain names. The ".com" zone file then refers the query to a second-level domain name file with all the second-level domain names under ".com." This is where the "bettyandnicks.com" query ends: the second- level domain name file has the information matching the domain name to its associated Internet Protocol number. With the Internet Protocol number, the user's computer can connect the user

4. There are 13 root servers, named A through M, which together contain authoritative domain name databases. See 63 Fed.Reg. at 31,742. Information that a domain name is associated with a certain Internet Protocol number goes on the A root server. See PGMedia, Inc., No. 97 Civ. 1946 RPP, slip op. at 6. Servers B through M download new domain name registration and Internet Protocol number information on a voluntary and daily basis from the A root server. See 63 Fed.Reg. at 31,742; see also PGMedia, Inc., No. 97 Civ. 1946 RPP, slip op. at 6. In this way, no matter which root server a user's computer utilizes to commence an address inquiry, the query can be completed successfully. See PGMedia, Inc., No. 97 Civ. 1946 RPP, slip op. at 6.

to the requested Internet site. The "bettyandnicks.com" home page will appear, just as if the user had typed in the Internet Protocol number instead of the domain name. See PGMedia, Inc., No. 97 Civ. 1946 RPP, slip op. at 5.

Initially, the Internet Assigned Numbers Authority retained responsibility for both Internet Protocol number allocation and domain name registration. See id. at 7. In 1991 and 1992, NSF, an independent agency of the federal government, assumed responsibility for coordinating and funding the management of the nonmilitary portion of the Internet infrastructure.[5]

In March 1992, NSF solicited competitive proposals to provide a variety of infrastructure services, including domain name registration services. NSF issued the solicitation pursuant to the National Science Foundation Act of 1950, 42 U.S.C. §§ 1861-1887, as amended, and the Federal Grant and Cooperative Agreement Act, 31 U.S.C. §§ 6301-6308.[6] In

5. The NSF's role in the Internet's evolution began even earlier. In 1987, the NSF awarded grants to IBM, MCI, and Merit to develop the NSFNET, a national high-speed network based on Internet protocols. See 63 Fed.Reg. at 31,742. The NSFNET, the largest of the governmental networks, provided the "backbone" to connect other networks serving more than 4,000 research and educational institutions throughout the country. See id. In 1992, Congress gave the NSF statutory authority to allow commercial activity on the NSFNET. See id. This facilitated connections between NSFNET and newly forming commercial network service providers, paving the way for today's Internet. See id.

6. The solicitation did not anticipate the explosion in the volume of domain name registrations that would occur. Only 3,950 nonmilitary domain names were registered at the time of the solicitation, and monthly

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December 1992, after an independent review of the proposals responsive to the solicitation, NSF selected the bid from, and entered into a cooperative agreement with, Network Solutions, Inc., a private company.

B

The dispute in this case turns partly on the terms of the cooperative agreement, which took effect January 1, 1993, and, as amended, runs through September 30, 2000, at the latest. Network Solutions became the exclusive registry and exclusive registrar for the ".com," ".org," ".net," and ".edu" top-level domains. See 63 Fed.Reg. at 8828. As a registry, Network Solutions maintains a top-level domain's zone files, the directory databases listing domain names and their Internet Protocol numbers. See 63 Fed.Reg. at 8828. As registrar, Network Solutions acts as go-between for domain-name holders and the registry, providing various services, including the registration of domain names on a first-come, first-served basis. See 63 Fed.Reg. at 8828. The company also currently maintains the "A" root server, see supra note 4.

The agreement provided that NSF would compensate Network Solutions in accordance with a cost-plus-fixed-fee arrangement. The cost-plus-fixed-fee arrangement ended on September 14, 1995. Pursuant to an amendment to the agreement, Network Solutions started charging domain name registrants a one- time registration fee of $100 for registration services for the first two-year period, and $50 per year thereafter, with 70 percent of the fees going to Network Solutions as

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registrations averaged 229. By September 1997, the rate of registrations reached 125,000 per month, and there were roughly 1.9 million names registered.

"consideration for the services provided" and 30 percent set aside, in a custodial account held by Network Solutions on NSF's behalf, for preserving and enhancing the "Intellectual Infrastructure of the Internet." The 30 percent portion — the "Preservation Assessment" — was discontinued for registrations made on or after April 1, 1998.[7]

Plaintiffs are individuals and companies (collectively "registrants") who paid fees to Network Solutions to register and maintain their domain names. They sued Network Solutions and NSF claiming that the domain name fees violated the Constitution, the Sherman Act, the Independent Offices Appropriation Act, and the Administrative Procedure Act. They sought damages, declaratory and injunctive relief, refund of the fees earmarked for the Preservation Assessment, and return of the above-cost portion of the fees they paid to Network Solutions between September 14, 1995, and March 31, 1998, for registration services.

On April 6, 1998, the district court dismissed most of the claims, but held that the Preservation Assessment was an above-cost tax Congress had not authorized and hence was unconstitutional. See Thomas v. Network Solutions, Inc., 2 F.Supp.2d 22, 31-32 (D.D.C.1998). Within weeks, Congress passed and the President signed into law § 8003 of the Fiscal Year 1998 Supplemental Appropriations and Rescissions Act, Pub.L. No. 105-174, 112 Stat. 58. Section 8003 is as follows:

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7. At that time, Network Solutions started charging $70 for registration services for the first two-year period, and $35 per year thereafter. Later in 1998, NSF transferred responsibility for administering its cooperative agreement with Network Solutions to the Department of Commerce.

Appendix A

> Ratification Of Internet Intellectual Infrastructure Fee. (a) The 30 percent portion of the fee charged by Network Solutions, Inc. between September 14, 1995 and March 31, 1998 for registration or renewal of an Internet second-level domain name, which portion was to be expended for the preservation and enhancement of the intellectual infrastructure of the Internet under a cooperative agreement with the National Science Foundation, and which portion was held to have been collected without authority in William Thomas et al. v. Network Solutions, Inc. and National Science Foundation, Civ. No. 97-2412, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed.
>
> (b) The National Science Foundation is authorized and directed to deposit all money remaining in the Internet Intellectual Infrastructure Fund into the Treasury and credit that amount to its Fiscal Year 1998 Research and Related Activities appropriation to be available until expended for the support of networking activities, including the Next Generation Internet.

112 Stat. 58, 93-94. Holding that § 8003 ratified the Preservation Assessment and thus mooted the sole surviving claim, the district court dismissed the entire case on August 28, 1998. On October 23, 1998, plaintiffs moved for reconsideration under Fed. R. Civ. P. 60(b). The district court

heard argument on the Rule 60(b) motion on November 24, 1998, ruling from the bench in defendants' favor. Registrants now appeal portions of the April 1998 and August 1998 district court orders.[8]

II

To begin, we shall assume, arguendo, that the 30 percent portion of the domain name registration fee Network Solutions collected and held for NSF constituted an illegal tax because, as the district court decided, NSF lacked congressional authorization. As all parties agree, this is not necessarily fatal because legislation may confirm and render lawful otherwise unlawful federal agency actions imposing charges on others. An old Supreme Court case — rarely cited but never overruled — stands for the proposition that Congress "has the power to ratify the acts which it might have authorized" in the first place, so long as the ratification "does not interfere with intervening rights." United States v. Heinszen & Co., 206 U.S. 370, 384, 27 S.Ct. 742, 51 L.Ed. 1098 (1907).[9]

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8. Registrants have not appealed the district court's dismissal of their claims concerning the Administrative Procedure Act and Article IV, § 3 of the Constitution. At oral argument, they also withdrew their appeal of the district court's dismissal of their claim under § 1 of the Sherman Act. See Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491, 1496 n. 7 (D.C.Cir.1995).

9. No party has drawn a distinction between congressional ratification before a judicial decision and ratification — as here — after a decision (but before a final judgment) declaring the agency action unlawful. Cf. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219-25, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). We will therefore assume that the two situations should be treated the same.

In view of Heinszen, registrants pose two questions: did Congress, in § 8003 of the 1998 supplemental appropriations act, mean to ratify the Preservation Assessment; and, if so, was Congress barred from ratifying NSF's action on the ground that it could not have authorized NSF to impose the assessment at any time.

As to the first question, the argument against ratification proceeds on the basis that if Congress had wanted to confirm the assessment § 8003 would have said "tax" rather than "fee." We think this difference between § 8003's description and the district court's is inconsequential. The effect of § 8003 is the same as if it had used the word "tax." In Heinszen, Congress called the "tax" at issue there a "duty," yet the Supreme Court still found a valid ratification. 206 U.S. at 378, 381-82, 27 S.Ct. 742. In Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 214-15, 222-23, 109 S.Ct. 1726, 104 L.Ed.2d 250 (1989), the Court sustained Congress's delegation of its taxing power in a provision, entitled "Pipeline safety user fees," directing the Secretary of Transportation to establish a system of "user fees" to cover costs of administering federal pipeline safety programs. See also Florida Power & Light Co. v. United States, 846 F.2d 765, 769, 776 (D.C.Cir.1988). Here, although the district court found the Preservation Assessment to be a "tax," we are certain that § 8003 addresses the resulting fund of money collected for NSF's benefit between September 1995 and March 1998. Section 8003 identifies this case by name and by its district court docket number; it accurately describes the district court's holding; it specifies the precise period when the Preservation Assessment was collected; and it mirrors the language the district court used in suggesting

ratification. The section's caption —"Ratification Of Internet Intellectual Infrastructure Fee" — makes Congress's intent unmistakable, and the accompanying Conference report states that § 8003 "serve[s] to ratify and confirm Congressional intent with respect to the collection and use of funds by the National Science Foundation. . . . and the language included in this new section will statutorily correct the lack of authority perceived by the court."[10] On the other hand, plaintiffs' reading of § 8003 renders the provision nonsensical. The district court had not held any "fee" illegal and so, if § 8003 ratified only user fees, it ratified nothing.

Registrants cannot, as they suppose, derive support for their interpretation of § 8003 from the Internet Tax Freedom Act, Title XI of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub.L. No. 105-277, 112 Stat. 2681 (1998). The Internet Tax Freedom Act became law after the district court's dismissal of this case; it does not repeal § 8003; in fact it does not even mention § 8003; the tax moratorium it enacts deals with prospective taxes imposed by states or political subdivisions thereof; it excludes from its coverage "liability for taxes accrued and enforced before the date of enactment of this Act"; and it

10. Registrants also make much of a letter from a Member of the House of Representatives and a letter from three Senators written after Congress passed § 8003. Such isolated post-enactment statements, to the extent that they are legislative history, carry little weight, see Landgraf v. USI Film Products, 511 U.S. 244, 262, 262-63 n. 15, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), and in any event, do not alter the plain meaning of this statute. It is clear that Congress meant to ratify the Preservation Assessment. Even these legislators do not appear to contest this. All they dispute is the Preservation Assessment's label — tax or fee.

specifically exempts "ongoing litigation relating to such taxes."

This brings us to the second question raised in light of Heinszen — whether Congress could have authorized NSF to collect the assessment from the beginning (if it could not have done so, it cannot ratify NSF's actions after the fact). Registrants start this part of their argument with the proposition that "Congress can never delegate the unfettered power to legislate," from which they conclude that Congress could not have delegated to NSF the power "to fix Internet taxes" before the 30 percent assessment went into effect. Appellants' Brief at 23-24. We think registrants' argument miscasts not only what Congress did, but also what Congress could have done initially. Section 8003 delegated to NSF no discretionary authority, much less the power to enact tax legislation or to fix tax rates. When Congress passed this provision in May 1998, the rate had already been set, the assessments already collected. Congress then knew how much Network Solutions had been charging registrants, the period during which the charges had been imposed (September 14, 1995, through March 31, 1998), and what portion of the charges — 30 percent — had gone to NSF and for what purpose. It was this "fee" that, in the words of § 8003, Congress "legalized and ratified and confirmed as fully to all intents and purposes as if the same had, by prior act of Congress, been specifically authorized and directed." If a prior act of Congress had directed NSF to collect $30 for each new registration and $15 thereafter and to retain the funds in order to support the Internet, we perceive no reason — registrants have offered none — why such legislation would not have been within Congress's constitutional power under Article I, § 8. See Federal Power

Comm'n v. New England Power Co., 415 U.S. 345, 349, 94 S.Ct. 1151, 39 L.Ed.2d 383 (1974); Seafarers Int'l Union of N. Am. v. United States Coast Guard, 81 F.3d 179, 182-83 (D.C.Cir.1996).

III

Count 10 of the amended complaint charges that Network Solutions, in violation of § 2 of the Sherman Act, 15 U.S.C., abused its alleged monopoly power in the domain name registration market by refusing to allow potential competitors to introduce additional top-level domains into the "Configuration File" — the "A" root server — " the Essential Facility controlled by [Network Solutions]."[11] The district court dismissed this claim for failure to state a cause of action, on the ground that a "federal instrumentality doctrine" gave Network Solutions the same immunity from antitrust liability as that enjoyed by NSF.

Whether there is, or should be, any such "federal instrumentality doctrine" in this context is not clearly settled. The Department of Justice, representing NSF in this appeal, has taken no position on the question. Network Solutions, seeking to convince us of its immunity, starts with the point that NSF is itself outside the reach of the Sherman Act. This

11. Count 10 might be read to allege another, distinct claim — namely, that Network Solutions denied access to the Configuration File to some unnamed potential competitors purportedly seeking to register domain names containing the customary top level domains. At oral argument registrants seemed to eschew such a reading. In any event, our treatment of Count 10 applies equally to this potentially distinct claim.

is clear enough. NSF is part of the federal government. The Supreme Court has interpreted the word "person" in § 2 of the Sherman Act to exclude the United States from liability. See United States v. Cooper Corp., 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071 (1941). We therefore held in Sea-Land Service, Inc. v. Alaska Railroad, 659 F.2d 243 (D.C.Cir.1981), that the Alaska Railroad, an entity wholly owned and operated by the federal government, was not subject to Sherman Act liability. Given NSF's antitrust immunity, Network Solutions maintains that it also has immunity so long as its alleged anti-competitive actions were "taken pursuant to the Cooperative Agreement." Network Solutions' Brief at 34. In agreeing with this conclusion, the district court relied on Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 58-65, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). But as Network Solutions now acknowledges, Southern Motor Carriers arose in a different setting. The Supreme Court was there interpreting the effect of Parker v. Brown, 317 U.S. 341, 352, 63 S.Ct. 307, 87 L.Ed. 315 (1943), which recognized the immunity of States under the Sherman Act for imposing a restraint on trade "as an act of government." As to entities under State regulation, Southern Motor Carriers held that if they take action pursuant to a "clearly articulated and affirmatively expressed" State policy, even a policy simply permitting the anticompetitive conduct, and if the State actively supervises the conduct, such private parties are also immune from antitrust liability. 471 U.S. at 62, 105 S.Ct. 1721. The Court's reasoning rested, in part, on considerations of federalism, considerations obviously not present when federal regulation is involved. See id. at 61, 105 S.Ct. 1721; compare Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 300-01, 93 S.Ct.

573, 34 L.Ed.2d 525 (1973), with 1A PHILLIP E. AREEDA & HERBERT HOVENCAMP, ANTITRUST LAWS § 248, at 116-18 (1997 ed.).

Just as important, Southern Motor Carriers dealt only with state regulation of private entities. See also Greensboro Lumber Co. v. Georgia Power Co., 844 F.2d 1538 (11th Cir.1988). Here we have instead a contractual relationship between a federal government agency and a private party.[12] It is not obvious to us, particularly in view of Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), reh'g denied, 411 U.S. 910, 93 S.Ct. 1523, 36 L.Ed.2d 201 (1973), that a private contractor automatically shares the federal agency's immunity simply because the contractor's allegedly anti-competitive conduct occurred — as Network Solutions puts it and some courts suggest[13] — "pursuant" to a government contract. A contractor might be free to perform the contract in any number of ways, only one of which is anticompetitive.[14]

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12. The complex subject of antitrust immunity for private parties, after the Supreme Court's decision in Parker v. Brown, is discussed at length in 1 PHILLIP E. AREEDA & HERBERT HOVENCAMP, ANTITRUST LAWS §§ 221-231, at 356-540 (revised ed.1997).

13. See, e.g., PGMedia, Inc., No. 97 Civ. 1946 RPP, slip op. at 20; Beverly v. Network Solutions, Inc., No. C-98-0337-VRW, 1998 WL 320829, at *4 (N.D. Cal. June 12, 1998); Medical Ass'n of Ala. v. Schweiker, 554 F.Supp. 955, 966 (M.D.Ala.1983).

14. In Otter Tail, an electric utility company sought to avoid Sherman Act liability partly on the ground that its anti-competitive

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Whether and under what circumstances a federal contractor has antitrust immunity are questions we leave to another day. A firmer ground for resolving this aspect of the case is presented; although it was neither raised nor decided in the district court, it has been argued on appeal and prudence dictates that we consider it. Count 10 of the complaint states, as the registrants agree, an "essential facilities" claim. See generally 3A PHILLIP E. AREEDA & HERBERT HOVENCAMP, ANTITRUST LAWS §§ 771-774, at 172-228 (1996); PHILLIP E. AREEDA & HERBERT HOVENCAMP, ANTITRUST LAWS 654-60 (1995 Supp.). Network Solutions, for the first time on appeal, contends that plaintiffs lack "standing" to raise their "essential facilities" claim. Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1088 (D.C.Cir.1998), decided after the district court's decision in this case, held that among the "elements of an antitrust claim for denial of access to an essential facility are (1) a monopolist who

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actions were pursuant to its contract with the Bureau of Reclamation, a federal agency. The Court rejected this defense, agreeing with the Solicitor General that "government contracting officers do not have the power to grant immunity from the Sherman Act." 410 U.S. at 378-79, 93 S.Ct. 1022. To this firm statement, the Court added what might be perceived as qualifiers: Such contracts stand on their own footing and are valid or not, depending on the statutory framework within which the federal agency operates. The Solicitor General tells us that these restrictive provisions [in the contract] operate as a "hindrance" to the Bureau and were "agreed to by the Bureau only at Otter Tail's insistence," as the District Court found. The evidence supports that finding.

Id. at 379, 93 S.Ct. 1022.

competes with the plaintiff controls an essential facility" and "(3) the monopolist denied the plaintiffs use of the facility. . . ." The plaintiffs here are those who registered their domain names for a fee. They are not, according to their amended complaint, competitors of Network Solutions. It follows that they have failed to satisfy two of the elements set forth in Caribbean Broadcasting. Does this mean they lack "antitrust standing," see Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535 n. 31, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), as Network Solutions claims, or does it mean that they have failed to state a cause of action? Our decision in Caribbean Broadcasting holds that competitor status is simply an element of the cause of action, in the absence of which the claim should be dismissed under Rule 12(b)(6), Fed. R. Civ. P. See 148 F.3d at 1089. While this does not necessarily preclude also treating the matter in terms of standing,[15] and thus as a question that may be raised at any time, we have determined to rely on Caribbean Broadcasting and its treatment of non- competitor status even if we are dealing not with standing but with a defense on the merits. As we have said, Caribbean Broadcasting came down after the decision below. If we ignored Caribbean Broadcasting and sent the case back to the district court, either because we disagreed with the district court's finding of immunity,

15. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 118 S.Ct. 1003, 1013 n. 2, 140 L.Ed.2d 210 (1998): "The question whether this plaintiff has a cause of action under the statute, and the question whether any plaintiff has a cause of action under the statute are closely connected — indeed, depending upon the asserted basis for lack of statutory standing, they are sometimes identical, so that it would be exceedingly artificial to draw a distinction between the two."

or because we thought further factual development was in order, see Otter Tail Power Co., 410 U.S. at 379, 93 S.Ct. 1022, Network Solutions would be free to invoke Caribbean Broadcasting in its answer, which it has not yet filed, or in a motion for summary judgment, or both. The district court would then have to rule in favor of Network Solutions because the plaintiffs are not competitors. There is no reason to postpone the inevitable. In these rather exceptional circumstances we have discretion to consider a claim neither raised nor decided in the district court. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 38-39, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989); Heckler v. Campbell, 461 U.S. 458, 468-69 n. 12, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983); Animal Legal Defense Fund v. Espy, 23 F.3d 496, 499 (D.C.Cir.1994). On the basis of Caribbean Broadcasting we therefore will affirm the district court's judgment dismissing Count 10.

IV

The final issue deals with the Independent Offices Appropriation Act ("Act"), 31 U.S.C. § 9701, a statute requiring that fees charged for federal agency services comport with set criteria.[16] Registrants claim that the above-

16. Section 9701 states in full:

> Fees and charges for Government services and things of value[:]
>
> (a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.

(Cont'd)

cost portion of the fees Network Solutions charged for its registration and renewal services violated the Act.

Government agencies cannot escape responsibility for failing to perform their statutory duties by hiring private parties to perform those duties. If a statute required NSF to register domain names, and NSF farmed this out to Network Solutions, the Act might apply. But that is not the situation before us. The key governing statute is 42 U.S.C. § 1862(g). While § 1862(g) may, or may not, permit NSF to register and renew domain names — we do not need to reach this question — we are certain that it does not require NSF to do so. It merely directs NSF "to foster and support access . . . to computer networks." 42 U.S.C. § 1862(g). One way to fulfill such a broad mandate, NSF apparently decided, was to enter into a cooperative agreement with Network Solutions

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> (b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be — (1) fair; and (2) based on — (A) the costs to the Government; (B) the value of the service or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts. (c) This section does not affect a law of the United States — (1) prohibiting the determination and collection of charges and the disposition of those charges; and (2) prescribing bases for determining charges, but a charge may be redetermined under this section consistent with the prescribed bases.

to have the company register and maintain second-level domain names.

Registrants argue that because a federal agency hired Network Solutions, the Act must cover the domain name fees. By its terms, the Act applies only to "a service or thing of value provided by an agency." 31 U.S.C. § 9701(a) (emphasis added). Here, a private party (Network Solutions) performed the domain name registration services — and did so as it saw fit. Registrants' amended complaint acknowledges Network Solutions' near total command over domain name registrations: "NSF has not and does not directly supervise or manage any NSI activities pertaining to the Domain Name registration process. The only 'control' and 'oversight' exercised by NSF over NSI and the Domain Name registration process is the contractual requirement that NSF submit certain limited quarterly and annual reports."[17] This might seem sufficient to indicate that the Act does not apply. But if we give the section a broader interpretation, see Ayuda, Inc. v. Attorney General, 848 F.2d 1297, 1299-1300 (D.C.Cir.1988), the question becomes whether domain name registration is a government service or thing of value within the Act's meaning. The answer, we believe, is no. As we said, Congress chose not to require NSF or any other agency of the federal government to register domain names. Simply because NSF might have been able to perform domain name registration does not transform this activity into a government service or thing of value. A recent and novel function such as domain name registration hardly strikes us

17. Registrants' admission that Network Solutions — not NSF — controlled the domain name registration process negates registrants' claim that Network Solutions was merely NSF's agent.

as a "quintessential" government service, as registrants suppose.[18] Indeed, it was not the government but the Internet Assigned Numbers Authority — headed by the late Dr. Postel at USC, see 63 Fed.Reg. at 8826 — that originally maintained host computer name lists.

The two Comptroller General decisions registrants cite do not alter this conclusion. In In re: FEC-Sales of Microfilm Copies of Candidate and Committee Reports, 61 Comp. Gen. 285 (1982), and In re: Retention of Fees Received by EPA Contractors Providing Information Services to the Public, 1975 WL 7967 (Comp. Gen. Oct. 20, 1975), federal agencies hired private firms to produce agency records on the agencies' behalf. Both cases involved services that statutes required the agencies to perform. There is no such statutory mandate here.

The Act is a nonfit in other ways. The Act applies to monies bound for the federal treasury. In its original form, the Act stated that "any amount" from fees or charges for government services "shall be collected and paid into the Treasury" as miscellaneous receipts. Pub.L. No. 137, tit. V, 65 Stat. 268, 290, formerly codified at 31 U.S.C. § 483a, recodified at 31 U.S.C. § 9701. The 1982 recodification of the Act omitted this requirement but only because § 3302(a)

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18. Registrants also stress the "public purpose" of domain name registration. But as the Supreme Court has said, albeit in a slightly different context: "[T]hat a private party performs a function which serves the public does not make its acts governmental." San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 543-44, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987) (citation omitted).

made it "unnecessary." 31 U.S.C. § 9701, Explanatory Notes. Section 3302 provides that any official or agent who receives money for the government from any source shall keep the money safe, see § 3302(a), and deposit the money in the Treasury, see § 3302(b). The monies at issue here — the 70 percent portion of the domain name fees — were paid to Network Solutions for its services. The company is under no duty to turn over any portion to the federal government. To the contrary, according to the cooperative agreement and federal law, see 58 Fed.Reg. 62,992, 62,995, 62,998 (1993), as amended by 62 Fed.Reg. 45,934 (1997), the monies belong to Network Solutions. Any remaining doubt is laid to rest by considering the penalty for noncompliance with § 3302. An official or agent who receives money for the government and does not deposit such money promptly in the Treasury may be removed from office. See id. § 3302(d). This sanction makes no sense with respect to a private actor like Network Solutions.

For all these reasons we hold that the Independent Offices Appropriation Act does not cover the fees Network Solutions charged for its services.

* * *

We have considered and rejected registrants' other contentions.

Affirmed.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED AUGUST 28, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM THOMAS, et al.,

Plaintiffs,

NETWORK SOLUTIONS, INC, and NATIONAL SCIENCE, FOUNDATION

Defendants.

Civ. No. 97-2412 (TFH)

MEMORANDUM OPINION

Pending before the Court are defendant National Science Foundation's motion to vacate the permanent injunction and to dismiss Count One of the Amended Complaint as moot, and plaintiff's motion for summary judgment on Count One. Also pending is plaintiffs' motion for entry of judgment on Counts Two through Ten of the Amended Complaint. After considering the submissions of all parties, the Court will deny plaintiffs' motion for summary judgment, and will grant defendant's motion to vacate the preliminary injunction and to dismiss Count One. Because the Court will enter judgment in favor of defendant on all counts, it will deny plaintiffs' motion for entry of judgment as moot.

Appendix B

I Background

This case concerns fees paid for registration of second-level domain names for use on the Internet. Plaintiffs, a group of nine persons and corporations that have registered domain names,[1] brought suit against defendants National Science Foundation ("NSF"), and Network Solutions, Inc. ("NSI"). Defendants, the first a government entity and the second a private corporation, have cooperated since 1993 to supervise and carry out the registration process. In 1995, defendants entered into a new agreement, which permitted NSI to collect fees for registration services. Pursuant to this agreement, defendants divide the fees between public and private purposes, with 70% going to NSI, as payment for services, and 30% deposited into an "Intellectual Infrastructure Fund," for future government use on Internet projects.[2]

In October of 1997, Congress appropriated $23 million from the Intellectual Infrastructure Fund, for use on "Next Generation Internet" projects. Shortly thereafter, plaintiffs filed this suit; on February 2, 1998, the Court granted plaintiff's motion for a preliminary injunction, and enjoined

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1. Plaintiffs have pending a motion for class certification, which is not yet ripe for decision.

2. The Court's Memorandum Opinion of April 6, 1998, provides more details of the arrangement between NSF and NSI and of the Intellectual Infrastructure Fund, as well as a brief description of the development and functions of the domain name system. Because those facts are not essential to the motions currently pending, the Court will not repeat them here.

defendants from spending monies residing in the Intellectual Infrastructure Fund. On April 6, 1998, the Court dismissed all counts of the Amended Complaint, except for Count One.[3] *See Thomas v. Network Solutions, Inc.*, 2 F.Supp. 2d. 22 (D.D.C. 1998). In so doing, the Court dismissed NSI from the case, since Count One concerned only defendant NSF.

Although the Court dismissed nine counts, it granted summary judgment for plaintiff on Count One, which alleged that the "Preservation Assessment" — the 30% of the registration fee that went to the Intellectual Infrastructure fund — was an unconstitutional tax. The Court held that the Assessment was a tax, and that it had not been imposed by Congress, as required by Article I, Section 8 of the Constitution. The Court further held that Congress had not taken any action to ratify the tax. Therefore, the Court concluded, the assessment was an illegal tax, and plaintiffs were entitled to summary judgment.

After the Court's decision, on May 1, 1998, the President signed into law H.R. 3579, the Fiscal Year 1998 Supplemental Appropriations and Rescissions Act. Section 8003 of that statute, which is entitled "Ratification of the Internet Intellectual Infrastructure Fee," addresses the tax considered by the Court in its opinion, and even refers to the opinion itself:

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3. Among the nine counts dismissed were a claim against NSI for collection of the fees, three statutory counts under the Independent Offices Appropriation Act, two counts under the Administrative Procedure Act, one count under Article IV of the Constitution, and two counts under the Sherman Act.

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> Sec. 8003. RATIFICATION OF INTERNET INTELLECTUAL INFRASTRUCTURE FEE. (a) The 30 percent portion of the fee charged by Network Solutions, Inc. between September 14, 1995 and March 31, 1998 for registration and renewal of an Internet second-level domain name, which portion was to be expended for the preservation and enhancement of the intellectual infrastructure of the Internet under a cooperative agreement with the National Science Foundation, and which portion was held to have been collected without authority in William Thomas, et al v. Network Solutions, Inc and National Science Foundation, Civ. No. 97-2412, is hereby legalized and ratified and confirmed fully as to all intents and purposes as if the same had, by prior Act of Congress, been specifically authorized and directed.[4]

Defendant[5] argues that this statute ratifies the Preservation Assessment, making it a legal tax, and that plaintiffs' claim is now moot, Therefore, it asks the Court to vacate the preliminary injunction against expenditures from the Intellectual Infrastructure Fund, and to dismiss the sole remaining count.

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4. Section 8003(b) authorizes defendant NSF to spend the money in the Intellectual Infrastructure Fund on the Next Generation Internet projects.

5. As Count One, the sole remaining count, concerns only defendant NSF, only NSF's interests are at stake in these motions. However, defendant NSI submitted a brief, which the Court has considered.

Appendix B

II Discussion

There is no dispute that the Preservation Assessment, as imposed by NSF in 1995, is an illegal tax. However, it is settled law that if Congress ratifies a tax, it is proper under the Constitution, even though the Congressional approval might postdate the initial imposition and collection of the tax. *United States v. Heinszen*, 206 U.S. 370, 390 (1907); *Canisius College v. United States*, 799 F.2d 18, 25 (2d Cir. 1986), *cert denied*, 481 U.S. 1014 (1987). Therefore, if Congress ratifies the Preservation Assessment, its collection is legalized, and the past collection is legalized retroactively.

Congress indirectly addressed the Preservation Assessment in the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, Pub. L. No 105-65, 111 Stat. 1344 (1997). In that statute, Congress authorized NSF to expend up to $23 million on the President's Next Generation Internet project. Defendants argued that this provision ratified the collection of the tax. The Court rejected that argument in its April 6, 1998, Memorandum Opinion, holding that the statute was not an effective ratification, because it did not specifically focus on the Preservation Assessment, and, more importantly, because it did not contain specific ratification language, as required under *Heinszen*.

Defendant now asserts that Section 8003 of the new statute is an effective ratification, and that collection of the Preservation Assessment is therefore legal. Plaintiffs present two arguments in opposition to this assertion. First, plaintiffs argue that the language in the statute is insufficient to ratify

the tax; second, they assert that Section 8003 is an insufficient vehicle for ratification.

A. Language of Section 8003

Section 8003 purports to ratify collection of the "Internet Intellectual Infrastructure Fee." Plaintiffs argue that this section does not ratify the Preservation Assessment because (1) it refers to the assessment as a "fee," rather than as a "tax," (2) its language does not meet the standards laid out in *Heinszen*, and (3) passage of the statute was achieved through deception, in violation of Congressional rules. None of these arguments can fare well; the statutory language clearly effects a valid ratification of the Preservation Assessment.

1. Use of the Word "Fee" Does Not Affect the Force of the Statute

Plaintiffs argue that section 8003 cannot be a valid ratification, because it labels the Preservation Assessment a "fee," when it is, in fact, a "tax." Plaintiffs argue both that Congress did not ratify the Preservation Assessment tax, but ratified only a "user fee," which does not exist, and that ratification is generally invalid unless it specifically labels a charge as a "tax."

Plaintiffs' first argument fails because section 8003 clearly targets the Preservation Assessment, even though it labels the Assessment as a "fee." There is no question that the charge described in section 8003 is the Preservation Assessment; the Assessment is commonly known as a "fee,"

and therefore may be identified as such, and the statute clearly mentions the "Intellectual Infrastructure Fee," which can only refer the Preservation Assessment. In addition, the explicit reference to this case sufficiently identifies the Preservation Assessment, since the Court has not found any other charges to be unauthorized. Therefore, there is no doubt that Congress intended to ratify the Preservation Assessment, and not some non-existant "fee," when it voted section 8003 into law.

Furthermore, plaintiffs present no authority for their blanket assertion that Congress must use the specific word "tax" in order to effect a valid ratification. *Heinszen* certainly does not impose such a requirement — the legislation at issue in that case did not use the word "tax" — and this Court's earlier holding did not, and could not, unilaterally write such an obligation onto *Heinszen's* precedent.[6] Thus, the Court cannot hold that section 8003 is invalid, simply because it incorrectly labels the Preservation Assessment a "fee," instead of a "tax."[7]

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6. In its Memorandum Opinion, the Court stated only that *Heinszen* required "clear recognition of the tax," not necessarily literal labeling *as* a tax. Section 8003, unlike the earlier statute considered by the Court in April, clearly recognizes the Preservation Assessment and its status as an unauthorized charge.

7. Indeed, logic suggests that an inaccurate choice of words alone does not alter the effect of section 8003. It is settled law that the use of monikers such as "fee" and "tax" carries little substantive weight, and the Court has already held that the character of the Preservation Assessment is not determined by its label — which is a "fee" — but by its substantive character, which is that of a tax.

Appendix B

Section 8003 leaves little doubt as to the target or the intended effect of its language. Furthermore, there is no authority to suggest that an effective ratification must use the word "tax." For these reasons, the Court cannot subjugate the clear intent of the statute — which is to ratify the Preservation Assessment — merely because Congress did not choose the word "tax."

2. Section 8003 Meets the Requirements for a Valid Ratification

Plaintiffs next argue that Congress has failed to manifest a clear intent to ratify the Preservation Assessment, as required by the Supreme Court in *Heinszen*. Although that Court did not establish a specific standard for valid ratification, a fair reading of the opinion suggests that Congress must at least express its clear recognition of the illegal nature of the tax, and its explicit intent to ratify that tax.

There is no doubt that section 8003 meets these requirements. It clearly identifies the tax at issue, and it clearly, if begrudgingly, recognizes that the tax had been "collected without authority." Congress's statement of intent is certainly explicit enough to satisfy *Heinszen* — indeed, Congress took its ratifying language for section 8003 from that case, word for word. Thus, the Court must find that section 8003 is sufficiently explicit to effect a valid ratification.

3. Plaintiffs' Assertions of Deception Are Irrelevant

Finally, plaintiffs assert that passage of section 8003 was

achieved in violation of House and Senate rules, and further that it was procured through deception — by "sneaking" the provision into the bill in committee, and by hiding the provision's true character.

Plaintiffs' first contention, that the statute was passed in violation of Congressional rules, is not justiciable, because the "political question doctrine" prevents the Court from interfering with the internal procedures of another branch of government. *Metzenbaum v. Federal Energy Regulatory Commission*, 675 F.2d 1282, 1286-88 (D.C. Cir. 1982); *Exxon Corp. v. Federal Trade Commission*, 589 F.2d 582, 590 (D.C. Cir. 1978). Thus, the majority of both Houses having given their assent to this legislation, the Court is precluded from frustrating its implementation by delving into alleged violations of housekeeping rules. *Metzenbaum*, 675 F.2d at 1287.

Plaintiffs' second contention is equally baseless. Plaintiffs have presented letters and other representations by United States Senators, who state their opposition to section 8003. Some of these Senators also state that, although they voted for the statute, they were unaware that the bill had a tax aspect. While the Senators' ire is no doubt genuine, it is irrelevant to the consideration of this Court. The statute was passed by both Houses and signed into law by the President, as required under the Constitution. It has long been the direction of the Supreme Court that proper enrollment of a statute is "conclusive proof of the enactment and contents of the statute," which cannot be contradicted by outside opinions, such as legislative journals or missives. *Field v. Clark*, 143 U.S. 649, 674 (1892). Where there is a plausible

basis for Congressional action, the Court cannot second-guess this basis, nor can it undertake an inquiry into the preparedness of the members who voted for particular legislation. *See Fritz v. U.S. Railroad Retirement Board*, 449 U.S. 166, 179 (1980) (If the courts undertook such an inquiry, "there would be very few laws which would survive it"). In the present case, there is no evidence that Congress as a whole was mistaken in its assumptions, or that either the House or the Senate lacked reasonable grounds to vote for the statute. For this reason, plaintiffs' assertions have no bearing on the validity of the statute.

B. Legality of Section 8003

Plaintiffs argue that, even if the language of section 8003 is sufficient to effect a ratification of the Preservation Assessment, the statute suffers from fatal flaws that frustrate that purpose. Plaintiffs argue that the provision cannot ratify the assessment because (1) Congress cannot retroactively alter substantive tax law in an appropriations bill, (2) the assessment is an illegal delegation of Congressional authority, and therefore cannot be ratified, and (3) the Court must strike down section 8003 under the Origination Clause.

1. The Mode of Ratification is Proper

There is no dispute that the Fiscal Year 1998 Supplemental Appropriations and Rescissions Act, which houses section 8003, is an appropriations bill. Plaintiffs argue that Congress cannot effect a substantive, retroactive change to substantive tax policy in an appropriations measure. In addition, plaintiffs argue that retroactive changes in tax policy

are permitted only to cure "administrative, procedural, and technical defects unrelated to the underlying policy." *See Van Emmerik v. Janklow*, 454 U.S. 1131, 1133 (1982) (White, J., dissenting).

Plaintiffs first argue that appropriations bills are generally disfavored as vehicles to impliedly enact substantive changes to the law. *TVA v. Hill*, 437 U.S. 153, 189-93 (1978). However, this general principle does not serve to derail the clear Congressional intent involved in the present case. While the Supreme Court disfavors *implied* changes through appropriations measures, it recognizes that Congress may modify substantive law if its "intent to modify is not only clear, but express." *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992). Since the intent behind section 8003 is both clear and express on the face of the provision, Congress may effect its ratification, even though it is contained in an appropriations statute.[8]

Plaintiffs' second argument, concerning imposition of retroactive taxes, also fails to derail section 8003. The argument relies on the dissenting opinion to a decision that left in place a retroactive tax increase on utility services. *Van Emmerik v. Janklow*, 454 U.S. 1131, 1133 (1982) (White, J., dissenting). In contrast, the majority opinion in *Heinszen* upheld the retroactive ratification of a previously-collected tax, which is not so easily distinguished from the present case. Furthermore, courts have routinely sustained retroactive tax legislation, as long as the tax is not "harsh and

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8. Furthermore, history provides a clear example in defendants' favor — the ratifying provision that the Supreme court upheld in *Heinszen* was contained in an appropriations statute.

oppressive." *See e.g., United States v. Carlton*, 512 U.S. 26, 30 (1994); *United States v. Hemme*, 476 U.S. 558, 568-69 (1986); *Welsh v. Henry*, 305 U.S. 134, 147 (1938). In light of the precedent set by these cases, the Court cannot accept plaintiffs' contention that Congress lacks the authority to ratify the Preservation Assessment, a tax that is neither harsh, nor oppressive.

2. There is no Delegation Problem

Plaintiffs assert that section 8003 improperly delegates the authority to set the rate of the Preservation Assessment, in violation of Article I's limitation that only Congress may levy taxes. This argument mischaracterizes section 8003. Contrary to plaintiffs' assertions, the provision does not authorize NSF to set whatever tax rate it wishes; the statute would not ratify a Preservation Assessment of $500 or $5000, but explicitly ratifies an assessment of 30%, and only an assessment of that amount. Furthermore, the provision makes clear that it does not delegate any rate-setting authority at all to NSF: it merely authorizes NSF to collect this specific tax, in the amount specified by Congress. Section 8003 does not contain any "intelligible guidelines" to aid NSF in setting tax rates because NSF does not have any power to set those rates. Instead, Congress has very narrowly, and very explicitly, set the rate, source, purpose, and use of the tax, and NSF's authority is limited to collecting taxes under the precise conditions set by Congress in this statute.

There is no dispute that Congress can impose a 30% tax on Internet registrations and renewals. There is further no dispute that it can authorize NSF, or its agent, to collect that

tax. Section 8003 does nothing more than to spell out that precise arrangement, and to retroactively ratify collections under those terms. The statute does not "bless" an illegal exercise in rate setting; rather, it engages in its own rate setting, and it specifies the only tax that NSF may legally collect. Therefore, section 8003 does not delegate any authority to NSF at all, beyond the authority to collect the Preservation, at the rate directed by Congress.

Plaintiffs still argue that Congress cannot ratify this tax, because it was initially set by NSF. They argue that, in order to retroactively ratify a tax set by an executive agency, Congress must, in effect, place its imprimatur on the agency's exercise of authority to set that tax, which it cannot do. Therefore, under plaintiffs' construction, Congress can only ratify a tax that it has set itself, or that an agency has set under "intelligible guidelines" from Congress.

The flaw in plaintiffs' argument is readily apparent. If Congress had initially imposed the Preservation Assessment, or if had produced sufficient guidelines to authorize NSF to set it, ratification would be unnecessary, since Article I would already be satisfied, Plaintiffs' extremely narrow view of *Heinszen* would render the opinion largely meaningless, since Congress could not ratify any taxes that actually needed ratification.[9] A more considered reading of *Heinszen*

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9. Plaintiffs rely primarily on a sixty-year old district court case, *Larabee Flour Mills Co. v. Nee*, 12 F.Supp. 395 (W.D. Mo. 1935), which appears to limit *Heinszen* to its peculiar facts, involving tariffs for protectorates. Given the lack of support, either in logic or in precedent, for such a narrow reading of the Supreme Court's opinion, however, the Court is not persuaded to adopt such a limitation in this case.

establishes that Congress may approve a specific tax, which was illegally set and imposed by a member of the executive, and ratify it, so that courts treat the tax as if it had been imposed by Congress from the start.

Section 8003 accomplishes precisely what *Heinszen* permits. The provision demonstrates clear Congressional recognition that NSF imposed the Preservation Assessment illegally, and a clear intention to ratify the 30% tax. It does not attempt to launder NSF's illegal actions, as plaintiff argues, but instead substitutes Congress's legitimate exercise of taxing authority for NSF's illegitimate exercise. This is precisely the substitution that *Heinszen* permits; therefore, there is no delegation problem.

3. Section 8003 Does Not Violate the Origination Clause

The Constitution requires that all bills for raising revenue must originate in the House of Representatives. U.S. Const., Art. I, Sec. 7, cl. 1. It is undisputed that section 8003 was placed into the statute in Conference Committee, not in the House. Therefore, argue plaintiffs, it runs afoul of the Origination Clause, and the Court must strike it down as unconstitutional.

It is clear, however, that a statute which raises funds to support a particular program, as opposed to raising revenue for the general Treasury, is not considered a "bill for raising revenue" within the meaning of the Origination Clause. *United States v. Munoz-Flores*, 495 U.S. 385, 398 (1990). In *Munoz-Flores*, the Court upheld a special assessment on criminal convictions, which was designed to support a Crime

Victims Fund, even though some excess contributions would be placed into the Treasury for the benefit of the government in general.

In the present case, all funds raised by the Preservation Assessment are earmarked specifically for the Intellectual Infrastructure Fund, to support specific programs for the development of the Internet. No portion of the Assessment would ever be deposited into the Treasury for general use. Because section 8003 raises funds only for a particular government program, it is not a bill for raising revenue, and it does not run afoul of the Origination Clause.[10]

IV Conclusion

On April 6, 1998, the Court held that the Preservation Assessment was an illegal tax, and it granted plaintiffs partial summary judgment on that basis. In response to the Court's opinion, Congress passed section 8003 of the Fiscal Year 1998 Supplemental Appropriations and Rescissions Act, which purported to ratify the Preservation Assessment. Based on that statute, defendant NSF asks the Court to vacate its award of partial summary judgment, and to dismiss the single remaining count.

As the Court has discussed above, the language of section

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10. Plaintiffs argue that *Munoz-Flores* applies only to statutes that *both* create a specific government program and design a means of funding that program. However, although the opinion could possibly support such a construction, it does not clearly restrict its holdings to those few statutes, and the Court's own reading of *Munoz-Flores* is not so limited.

8003 is sufficient to effect a valid ratification of the Preservation Assessment. The provision clearly identifies the assessment, recognizes the unauthorized nature of the tax, and manifests an unambiguous intent to ratify the tax. There are no ancillary problems with the statute itself; the appropriations bill is a proper vehicle for this provision, and section 8003 raises no problems of illegal delegation. Finally, because the statute raises funds for a specific program, and not for general government use, it is not a "bill for raising revenue" for purposes of the Origination Clause of the Constitution. Therefore, there are no reasons to deny section 8003 its intended effect.

In light of clear Congressional language, the Court must hold that section 8003 ratifies the Preservation Assessment. Therefore, the tax is now legally imposed, and there are no grounds to enjoin either its collection or use by NSF, as directed by Congress. For this reason, the Court must deny plaintiffs' motion for summary judgment, and must grant defendant's motions to vacate the preliminary injunction, and to dismiss the remaining count.

An order will accompany this opinion.

August 28th, 1998

s/ Thomas F. Hogan
Thomas F. Hogan
United States District Judge

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED APRIL 6, 1998

William THOMAS, et al., Plaintiffs,

v.

NETWORK SOLUTIONS, INC., and National Science Foundation Defendants.

No. CIV. 97-2412(TFH).

United States District Court,
District of Columbia.

April 6, 1998.

Internet domain name registrants brought action against National Science Foundation (NSF) and private company that operated domain registration system pursuant to cooperative agreement with NSF alleging, among other things, that preservation assessment portion of fee was an illegal tax. Plaintiffs moved for summary judgment and for preliminary injunction, and defendants moved to dismiss complaint. The District Court, Thomas F. Hogan, J., held that: (1) preservation assessment was an illegal tax; (2) collection of preservation assessment did not violate Independent Offices Appropriation Act (IOAA); (3) fact questions precluded summary judgment on damages issue; (4) injunction was not warranted; (5) portion of fees that covered private company's costs and profits did not constitute a tax; (6) private company's fees did not violate IOAA; (7) Administrative Procedure Act (APA) did not

apply to private company's fees; (8) registrants lacked standing to challenge cooperative agreement; (9) NSF's disposal of property did not violate Constitution; and (10) both NSF and private company were immune from suit under Sherman Act.

So ordered.

MEMORANDUM OPINION

THOMAS F. HOGAN, District Judge.

Pending before the Court are three motions: plaintiffs' motion for summary judgment on Counts One and Three of the Amended Complaint, plaintiffs' motion for a preliminary injunction, and defendants' motion to dismiss the entire Amended Complaint. The Court held a hearing on these motions on March 17, 1998. After consideration of the parties' briefs and arguments at that hearing, the Court will grant plaintiffs' motion for summary judgment on Count One; at this time, however, the Court will grant judgment only on the issue of liability, and will reserve judgment on the issue of damages and other relief until it has ruled on plaintiffs' motion for class certification. The Court will deny plaintiffs' motion for judgment on Count Three, and will grant defendants' motion to dismiss as to all counts of the Amended Complaint, except Count One. The Court will deny plaintiffs' motion for a preliminary injunction, and will dismiss all counts of the Amended Complaint, except Count One.

Appendix C

I Background

A. The Parties

Defendant National Science Foundation ("NSF") is an independent agency of the United States government, organized pursuant to a federal statute. 42 U.S.C. § 1861. NSF's primary function is to support and strengthen scientific research, engineering, and educational activity. 42 U.S.C. § 1862(a)(1). With the passage of the Scientific and Advanced Technology Act in 1992, NSF received an expanded mandate to support development of the Internet and to facilitate its use. See 42 U.S.C. § 1862(g).

Defendant Network Solutions, Inc. ("NSI") is a private company that has been engaged in the registration of domain names since 1991. In 1991, NSI won a subcontract to a procurement contract that Government Services, Inc. (GSI) had been awarded by the Defense Information Services Agency. NSI's duties under that subcontract were to perform domain name registrations and to assign Internet Protocol (IP) numbers. In 1992, NSI entered into a cooperative agreement with NSF to perform essentially the same functions. Under the terms of that agreement, which is scheduled to expire later this year, NSI manages and maintains the registry of domain names.

There are nine plaintiffs — three individuals and six corporations. Plaintiffs each allege that they have paid fees to NSI for the right to register domain names for use on the Internet.

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B. The Internet and Domain Name System

The Internet is a complex network that links computers worldwide. It is the outgrowth of a system known as ARPANET, a network that the military created in 1969 to link its computers with those of defense contractors and universities. See generally, Reno v. ACLU, __ U.S. __, __, 117 S.Ct. 2329, 2334, 138 L.Ed.2d 874 (1997). While that network no longer exists, it provided a model for a number of similar, civilian networks that eventually coalesced into the backbone of the modern Internet.

Use of the Internet has grown exponentially over the past eighteen years. In 1981, an estimated 300 computers were linked via these networks; by 1996, the number had risen to an estimated 9.4 million computers, and some experts believe that 200 million persons will use the Internet by 1999. Nearly 60% of the computers currently linked to the Internet are located in the United States.

In order to fully access the Internet, a user needs a unique address, called an "Internet Protocol," or "IP," address. It is from this address that a user may post information, access information at other addresses, or exchange information with another user. IP addresses are composed of a long string of numbers; because of this, however, they are themselves rarely memorable. In order to smooth the transfer of information, a user will often attach an alphanumeric "domain name" to his or her IP address.

Domain names consist of a series of letters or numbers, followed by a period and a specific three letter designation.

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The series of letters and numbers to the left of the period is called the "second level domain name," and it is unique to the individual user. This name can be tailored to be easily remembered, and even to convey information about the user — it is often descriptive, catchy, and occasionally clever. In the United States, the three letter designation to the right of the period is one of seven handles: "gov," "org," "com," "net," "edu," "mil," or "int."[1] These seven handles are called "top level domain names."

It is clear that domain names make the Internet much more accessible. Instead of seeking information at a site designated only by a random number, the user can access a site by its descriptive name. If the name is properly registered and linked to an IP address, the user will be conveyed to the site he or she seeks.

The key, of course, is that the name and the IP address must be linked together. In order to prevent confusion — two users with the same name, for example — users must register their second level names with one of the seven top level names. Although there has been discussion of competition in the registration of domain names, at this time a user may register in a top level domain name only through defendants.[2]

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1. There are more top-level names in foreign countries, where domain names may also be followed by a two letter country code, such as "fr" in France.

2. A user can gain access to the Internet without registering a top level name, by seeking access through a company that already has a top level name. In this case, the user's domain name consists

(Cont'd)

Appendix C

C. Solicitation and Award of Cooperative Agreement to NSI

Before 1992, NSF performed many administrative tasks in regard to the non-military aspect of the nascent Internet. Among these tasks was the registration of domain names and the maintenance of the registry of names. However, in March 1992, NSF issued Solicitation 92-24 for a Network Information Services Manager for the Internet. NSF considered proposals from three firms that wished to assume the task of providing registration services for the non-military component of the Internet.

NSF chose NSI, and on January 3, 1993, the two entered into Cooperative Agreement No. NCR-9218742. The contract specified that, after a three month "phase-in" period, NSI would provide registration services for five years, with a six month "flexibility period" at the end. Therefore, the cooperative agreement that became effective on January 1, 1993, was due to expire on March 31, 1998, and has a flexibility period that will expire on September 30, 1998.

The original contract called for NSI to operate on a "cost-plus-fee" basis, meaning that NSI received reimbursement

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of a unique name, followed by the "@" symbol, followed by the company's second and top level designations. According to the information before the Court, most users see no noticeable difference in either method. Having one's own top level name is similar to receiving mail at a unique address, such as a house, and going through another's top level name is like receiving mail at a private part of a shared address, such as a post box in an apartment building. However, some users do have plans for which this method is insufficient; those users require a top level name, and must register with defendants to obtain it.

for its costs, plus a fixed fee that ensured the company's profit. Under this original contract, the costs and fees were paid by NSF out of its operating budget; users did not have to pay fees to register or to maintain domain names. The contract estimated that, over the five year life of the agreement, NSI would receive $4,854,061 in cost reimbursement and $365,278 in fixed fee profit. See Cooperative Agreement at Art. 8, ¶ A.

D. Amendment of Cooperative Agreement

The original agreement provided that changes may eventually be made; among these contemplated changes was "the imposition of a user based fee structure." Id. at Art. 3, ¶ G. The contract provided that the fee structure could be re-assessed through peer review at any time before December 31, 1994. Id. at Art. 5, ¶ B. An independent panel (allegedly with no representatives of NSI or NSF) began its review in late 1994; in March 1995, NSI proposed to charge prospective users for registration.

On September 13, 1995, NSF and NSI entered into Amendment 4 of the Cooperative Agreement. This amendment eliminated the "cost-plus-fee" method of compensation. In its place, it permitted NSI to charge fees for the registration and maintenance of domain names, which meant that, for the first time, users had to pay to register and maintain their domain names. The amendment set the fees at $100 to register and at $50 to renew annually.[3] Since 1995, NSI has been solely responsible for collecting these fees.

3. The fee for initial registration also covered the maintenance of the name for the first two years. Thus, the per year cost of registration and renewal are the same.

The amendment does not permit NSI to keep the entire fee as reimbursement for costs and profit. Instead, NSI keeps 70% of each fee for itself and places the remaining 30%[4] into the Intellectual Infrastructure Fund. The 30% contribution is commonly known as the "Preservation Assessment." NSI is responsible for maintaining the Fund, but the government directs the expenditure of monies from the Fund.

E. NSI's Experience Under the Cooperative Agreement

The Internet landscape is substantially different in 1998 than it was in 1993, when NSI and NSF entered into their cooperative agreement. In 1992, NSF and NSI estimated that the latter would perform about 229 new registrations per month. That estimate quickly became outdated. In March of 1994, NSI was performing 1,376 new registrations per month. In December 1994, it performed 3,164, and in April 1995, the number was 9,774. NSI estimates that, by late 1997, it was handling 120,000 new registrations per month, and it had registered a total of 2,269,751 domain names, including 1,957,239 in the ".com" top level domain.

Given the fee structure in place after September 1995, NSI clearly had substantial receipts for its efforts. The parties disagree to some extent about the exact amount of receipts, and the parties disagree as to NSI's profit margins. Plaintiffs allege that NSF gave NSI all its hardware and software free of charge. Plaintiffs further allege that NSI's per registration cost is approximately $10, and that it does not exceed $20 in

4. This 30% assessment equals $30 of each initial registration and $15 of each annual renewal.

any case.[5] Therefore, argue plaintiffs, NSI has amassed $89.7 million in above cost profit in just under five years.[6]

Defendants dispute plaintiffs' characterizations. They argue that plaintiffs' economic models intentionally overestimate profits and underestimate costs. NSI asserts that it has incurred, and continues to incur, substantial costs. It argues that it has purchased most of its own equipment and software, and that its registration activities require substantial, expensive human involvement. NSI asserts that it performs both the relatively inexpensive "back-end registry" function that its would-be competitors might also perform, and the more expensive, "customer-facing registrar" function, which requires more man hours. Therefore, NSI argues, its fees are more closely aligned to its costs. NSI does not actually reveal those costs, but it does state that its total profits under the Cooperative Agreement are approximately $7.1 million, not the $89.7 million estimated by plaintiffs.

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5. In support of their claims, plaintiffs assert that potential competitors to NSI have plans to charge between $11 and $19 per registration.

6. Plaintiffs also argue that NSI has additional sources of profit under the Agreement. It is undisputed that NSI continues to collect fees for registration and maintenance services, even though those fees cover services to be performed after the expiration of the Cooperative Agreement later this year. Plaintiffs also allege that NSI charges $10 for "expedited registration" and that it charges $49 to reserve a domain name for future registration.

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F. Intellectual Infrastructure Fund

According to Amendment 4, 30% of all registration fees[7] are considered part of the "Preservation Assessment," and are placed in the Intellectual Infrastructure Fund. As of September 30, 1997, the Fund contained at least $37 million. Plaintiffs claim that, at the current rate of domain name registration, the Fund will exceed $120 million by December 1998. According to NSI's own statements, it deposits these funds and maintains the account, but it does so only as a proxy for NSF; NSI admits — and, indeed, insists — that the Intellectual Infrastructure Fund is the government's money, and that the government alone can choose how and when to spend it. NSI makes no claim at all for ownership of these funds.

Congress also seems to treat the Intellectual Infrastructure Fund as government money. In October of 1997, Congress passed the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, Pub.L. No. 105-65, 111 Stat. 1344 (1997), which authorized an expenditure of $23 million on the "Next Generation Internet" program. The Next Generation program is aimed primarily at upgrading the Internet infrastructure, improving the speed and accuracy of information delivery, and increasing access for schools. Although the statute does not mention the Intellectual Infrastructure Fund by name, there is little dispute that Congress intended it as the source of funding for the Next Generation project.

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7. The assessment applies only to registration and renewal fees; fees for expedited registration and for name reservation are not subject to the Assessment.

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There are indications that the Preservation Assessment is designed to raise funds for government use. For example NSF's Inspector General commented that "a portion of the fees obtained to register Internet addresses [should] be allocated to support further Internet development." Inspector General's Report, February 7, 1997, at 1. In order to implement this proposal, the I.G. suggested that "federal oversight of Internet addresses should generate income for the government." Id. at 9. The Report then presents the Preservation Assessment scheme as the means to generate that income for use on broader Internet projects.

II Plaintiffs' Summary Judgment Motion

Plaintiffs have moved for summary judgment on Counts One and Three of their Amended Complaint. In these counts, plaintiffs argue that the Preservation Assessment is an illegal tax and, therefore, that the collection of this fee must cease and that the funds must be returned. On February 2, 1998, the Court granted plaintiffs' motion for a preliminary injunction based on the allegations in these counts, and the Court enjoined defendants from spending, or otherwise using or dissipating, the money in the Intellectual Infrastructure Fund.

Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In considering a motion for summary judgment, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). There is a genuine issue of fact only if there is such evidence that a reasonable jury could return a verdict for the non-moving party; a fact is material only if it might affect the outcome of the suit under applicable law. Id. at 248, 106 S.Ct. 2505.

Plaintiffs argue that the Preservation Assessment is an illegal tax because it was not authorized by Congress. It is clear that only Congress has the power to levy taxes. U.S. Const., Art. I, Sec. 8; National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 340, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974); Bell Atlantic Telephone Cos. v. Federal Communications Commission, 24 F.3d 1441, 1445 (D.C.Cir.1994). It is undisputed that Congress did not itself impose the Preservation Assessment — NSF and NSI devised it in Amendment 4 to the Cooperative Agreement. Therefore, as the Court indicated in its February 2, 1998, Memorandum Opinion, plaintiffs will prevail on their claim if they show both (1) that the assessment is a tax, and (2) that Congress has not ratified the tax.

A. Character of the Assessment

Plaintiffs argue that the Preservation Assessment is a tax; defendants argue that it is a fee, which may be collected without Congressional action, or that it is "program income," which is a category of revenue that is special to grants and cooperative agreements.

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1. Tax or Fee

Defendants first argue that the Preservation Assessment is not a tax, but a regulatory fee. There is no single test to evaluate the assessment's character, but several cases present criteria that are useful for the Court's consideration. The Supreme Court distinguishes a tax as a payment which is arbitrarily imposed for some public purpose. In contrast, a fee is payment for a voluntary act, such as obtaining a permit, that goes to defray the expenses of regulating that act. National Cable, 415 U.S. at 340, 94 S.Ct. 1146; Williams v. Motley, 925 F.2d 741, 743 (4th Cir.1991); United States v. Maryland, 471 F.Supp. 1030, 1036 (D.Md.1979); In re Farmers Frozen Food Co., 221 F.Supp. 385 (N.D.Cal.1963).

Other courts focus more specifically on the benefits conferred by an assessment. These courts hold that a payment is a tax when it confers no special benefit on the payee, or when the assessment is intended to raise general revenue; in contrast, a fee gives the payee value for payment, in the form of defraying the regulatory expenses necessary to keep certain services active. See Cumberland Farms, Inc. v. State of Maine, 116 F.3d 943, 946-47 (1st Cir.1997); United States v. River Coal Co., Inc., 748 F.2d 1103, 1106 (6th Cir.1984); Butler v. Maine, 767 F.Supp. 17, 19 (D.Me.1991).

Finally, some courts look at the nature and value of the service provided by an agency, in exchange for the regulatory assessment. These courts hold that an assessment may be a tax if it is not fairly tied to both the value received by the payee and to the cost of the service to the agency. See

Massachusetts v. United States, 435 U.S. 444, 464, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978); United States Shoe Corp. v. United States, 114 F.3d 1564, 1571 (Fed.Cir.1997). If the payee does not receive a benefit commensurate to the value of the assessment, or if the agency charges in excess of its costs and expenses, these courts hold that an assessment is a tax.

The Preservation Assessment is clearly a tax under any of these formulae. There is no dispute that the assessment is involuntary — it is automatically charged to every domain registration, and registrants cannot opt out of the charge.[8] Furthermore, NSI collects the assessment for the government's use on public goals, and not in any way to defray regulatory costs.[9] In addition, defendants admit that

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8. Defendants argue that, because domain registration is a voluntary act, the Preservation Assessment is voluntary. This argument cannot support itself, because the assessment is not really a charge for registration, but is instead a payment above and beyond the cost of the registration itself. See e.g., Williams v. Motley, 925 F.2d at 743; River Coal, 748 F.2d at 1106. Therefore, while the payment of a fee for registration services may be voluntary, payment of the Preservation Assessment, which is a charge independent of the registration payment, is not.

9. Defendants assert that the assessment is not designed to raise revenue, because it is not deposited into the federal Treasury, but into a separate fund. However, this argument rests on mere semantics — the assessment is income designed for a public purpose, which is essentially unrelated to the persons paying the fee. Where it is kept while awaiting that purpose is irrelevant. As such, it must be considered revenue for the government, whatever name defendants wish to attach to it.

the cost of providing the initial registration service is at most $70; the $30 paid to the Preservation Assessment is entirely in excess of cost.[10] Thus, there is no dispute that the Preservation Assessment exists to generate revenue for public projects and goals, or that it is a fee imposed independent of and above the cost of domain name registration.

The Preservation Assessment is an involuntary assessment, it provides revenue for the government, for use on projects that do not directly benefit the payees or otherwise apply to the purposes furthered by the NSF-NSI Agreement, it is entirely in excess of the costs of the special registration services sought by plaintiffs, and it raises the overall cost of registration by nearly 50%. For these reasons, the Preservation Assessment is not a regulatory fee, but is instead a tax on registration.

2. Program Income

Defendants argue that, even if the Preservation Assessment resembles a tax, it is not really a tax, but is instead "program income." Defendants argue that program income is not federal in character, and that NSI can properly collect program income under the Cooperative Agreement.

Program income is a special creature that is unique to the habitat of administrative grants and cooperative agreements. OMB Circular A-110 defines it as "gross income received by the recipient [of a grant] that is directly generated

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10. There is a proportional disparity in the yearly renewal fees, $35 of which go to cover costs, with $15 going to the assessment.

by a supported activity or earned as a result of the award. Program income includes, but is not limited to, income from fees for services performed . . ." OMB Circular A-110 at Subpart A, § 2(x). The Circular further provides that program income can be retained by the grantee, and that it may be added to committed funds to further program objectives. Id. at Sub. C, § .24(b)(1). The Code of Federal Regulations contains a similar definition of "program income," and contains similar language concerning its use. See 45 C.F.R. § 602.25(b),(g).

Defendants claim that the Preservation Assessment is program income, and that it is properly appropriated to NSF as such. The key questions before the Court are (1) whether the Preservation Assessment is program income, and (2) whether program income may be placed into a special fund for unspecified appropriation by the federal government. The concept of program income has not been treated extensively by courts or by agencies; however, the parties have cited sufficient authorities to convince the Court that the Preservation Assessment is not program income, and that program income may not, in any case, be used as defendants suggest.

a. Nature of Income

Although the OMB and C.F.R. discussions are undetailed, the scant available administrative case law suggests that "program income" refers to income from incidental transactions that are peripheral to a grant relationship. For example, in Matter of Job Corps Center Receipts, 65 Comp. Gen. 666, 1986 WL 60633 (C.G. June

25, 1986), an administrative judge held that receipts from a Job Corps Center's sales of meals, clothes, tool kits, and arts and crafts were program income, as were minor fines and restitution. Job Corps, 65 Comp. Gen. at 670-72. However, the receipts from these sales were clearly incidental to the main function of Job Corps. Similarly, in Matter of Armed Forces Institute of Pathology, 1978 WL 11329 (C.G. August 24, 1978), the Comptroller General considered sales of an Atlas of Tumor Pathology by universities that received federal grant money to study tumors. Again, the judge found that the sales were incidental receipts that could be retained by the grantee, for further use within the program.

The Preservation Assessment certainly does not have the incidental characteristics of cafeteria receipts or even of a medical atlas. Under the Cooperative Agreement, collection of fees for registration services is the integral part of NSI's function, and the Preservation Assessment represents approximately 30% of NSI's gross receipts. Therefore, the assessment is not an incidental receipt, and neither the caselaw nor the administrative authorities support its characterization as program income.[11]

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11. In addition, the authorities discuss program income in the context of a federal grant relationship. NSI is not a federal grantee — unlike Job Corps or the universities, it does not receive federal appropriations to carry out its purpose. There is no indication that receipts garnered pursuant to a Cooperative Agreement can be considered program income. However, because the Court finds that the Preservation Assessment cannot be considered program income for other reasons, it need not address this issue.

b. Use of Income

As stated in the OMB Circular, a grantee may add program income to its appropriation, to be "used to further eligible project or program objectives." OMB Circular at Sub. B, § .24(b)(1). Consistent with this statement, the grantees in Job Corps and Armed Forces kept the program income, instead of sending it to the U.S. Treasury, and the income was either credited against the next appropriation or added to the appropriation. Thus, the retention of program income is clearly meant to either supplement government funding, or to reduce the amount of funding that comes out of the Treasury. Furthermore, there is no doubt that the OMB Circular 110 contemplates that program income will be spent in furtherance of grant objectives.

The first dissimilarity between the OMB Circular, the Comptroller General cases, and the present situation is that NSI receives no appropriation. NSI cannot use the Intellectual Infrastructure Fund to replace or augment any government funds, because it does not receive any such funds. Thus, the Court finds it difficult to square defendants' proposed use of this money with the uses suggested by the administrative authorities.

In addition, program income, as defined by the OMB, is retained by the grantee, for use on projects that further its program objectives. In contrast, the Preservation Assessment is not retained by NSI, but is instead earmarked for a fund controlled by NSF, and is designed for use on projects that are at best tangentially related to NSI's program objectives. Therefore, the use of the assessment contemplated by

defendants does not coincide with the uses described by the OMB or by the Comptroller General.

c. Conclusion

The Preservation Assessment cannot be considered program income, as that term is defined by OMB Circular 110, the relevant provisions in the C.F.R., and the administrative caselaw. Unlike cafeteria receipts or publication sales, collection of the assessment is hardly incidental; rather, it is an integral part of NSI's registration operation. Furthermore, unlike traditional program income, the Preservation Assessment is not retained by the grantee (NSI) for use on program objectives. Instead, it is collected for use by the government, on projects largely unrelated to the registration of domain names.

Therefore, the Court finds that the Preservation Assessment is not program income. It bears all the marks of a tax, and none of program income. The fact that NSI collects the assessment on behalf of NSF, instead of NSF collecting it directly, does not serve to launder the funds; it is still a tax, collected without Congressional approval. As such, it is illegal under Article I, § 8 of the Constitution.

3. Ratification

Even if the Preservation Assessment is an illegal tax, it still need not violate the Constitution. Article I, Section 8, does not bar taxes absolutely, but merely requires that Congress impose the taxes. It is settled law that if Congress

ratifies a tax, it is proper under the Constitution, even though the Congressional approval might postdate the initial imposition and collection of the tax. United States v. Heinszen, 206 U.S. 370, 390, 27 S.Ct. 742, 51 L.Ed. 1098 (1907); Canisius College v. United States, 799 F.2d 18, 25 (2d Cir.1986), cert. denied, 481 U.S. 1014, 107 S.Ct. 1887, 95 L.Ed.2d 495 (1987). Therefore, if Congress ratifies the Preservation Assessment, its collection is legal; even the past collection of monies is retroactively legal.

Congress has already addressed the issue of the Preservation Assessment, if only indirectly. In the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, Pub.L. No 105-65, 111 Stat. 1344 (1997), Congress authorized NSF to expend up to $23 million on the President's Next Generation Internet project. The House and Senate Reports indicate that Congress implicitly directed that these monies be withdrawn from the Intellectual Infrastructure Fund.

Defendants argue that this Act represents a Congressional ratification of the Preservation Assessment, but they are incorrect. Legislation can effect a ratification only if Congress clearly recognizes the unauthorized tax and specifically states that the tax is ratified. For example, the legislation at issue in Heinszen effected a valid ratification of taxes collected by the military in the Philippines only because the statute recognized that the taxes had been illegally collected, and because Congress stated that those taxes "are hereby legalized and ratified." See Heinszen, 206

U.S. at 381. The legislation must make its purpose explicitly clear in order to effect a ratification.[12]

In the present case, Congress has not ratified the Preservation Assessment. The appropriations act cited by defendants never mentions the assessment or the Intellectual Infrastructure Fund. Therefore, because the Act does not contain the clear recognition of the tax and through specific ratification language, as required by Heinszen, it is not an effective ratification of the tax.

Congress may have intended to grant NSF the authority to collect the assessment, but it has not yet done so. It still retains the power to ratify the collection, even at this late date; there does not appear to be an expiration date on Congress's power to effect a ratification. However, if it wishes to effect such a ratification and permit NSF to use the Intellectual Infrastructure Fund, Congress must pass legislation that more explicitly conveys its intentions. Otherwise, the collection and appropriation of the Preservation Assessment remains illegal.

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12. In addition, the Act is an appropriations bill, and it is well recognized that Congress does not normally perform legislative functions — such as ratification — through appropriations bills. See e.g., National Audubon Society v. Andrus, 442 F.Supp. 42, 45 (D.D.C.1977). This does not mean that Congress cannot effect a ratification through an appropriations bill, but it does mean that Congress must be especially clear about its intention to do so. Associated Electric Co-op., Inc. v. Morton, 507 F.2d 1167, 1174 (D.C.Cir.1974), cert. denied, 423 U.S. 830, 96 S.Ct. 49, 46 L.Ed.2d 47 (1975).

B. Statutory Claims

In Count Three, plaintiffs argue that collection of the Preservation Assessment is improper under the Independent Offices Appropriation Act (IOAA). The IOAA provides that an agency may only collect fees that are (1) fair, and (2) based on costs, value, public policy, or some other relevant factor. 31 U.S.C. § 9701. The Supreme Court interprets the statute to prohibit an agency from collecting nearly any payment that exceeds the agency's cost. National Cable, 415 U.S. at 343, 94 S.Ct. 1146. Therefore, argue plaintiffs, if the Preservation Assessment is an illegal tax, it also violates the IOAA.

As the Court has described above, the Preservation Assessment is a tax, and it would be unlawful for an agency to collect it under the IOAA. However, NSI, which collects the assessment, is not a government entity; therefore, the Court does not see that the statute can apply in this case. Furthermore, the IOAA applies only to fees collected for government services, and this fee is not imposed on top of a government service, but a private one. Therefore, although the Preservation Assessment is an illegal tax, it does not fall within the scope of the IOAA. For this reason, the Court must deny plaintiffs' motion as to Count Three. However, plaintiffs seek parallel relief for each count; therefore, plaintiffs are entitled to full relief under Count One.

C. Conclusion

The Court will grant judgment for plaintiffs on the issue of defendants' liability under Count One of the Amended

Complaint. The Court will not, at this time, address the issue of the proper remedy for that liability, however. Unless Congress acts to ratify the collection of the Preservation Assessment, plaintiffs may be entitled to a refund of the taxes that they have paid. There is, however, a material question of fact as to the extent of this refund; among other issues, it is unclear how much money the Intellectual Infrastructure Fund contains. Furthermore, plaintiffs have filed a motion for class certification, which could substantially expand the scope of their relief. For these reasons, the Court will grant summary judgment for plaintiffs on Count One, but will defer the entry of relief until it has decided the class certification motion.

III Plaintiffs' Motion for a Preliminary Injunction

Plaintiffs' motion for a preliminary injunction, originally asked the Court to enjoin defendants from continuing to operate the domain registration system and to freeze $89.7 million of NSI's assets.[13] Plaintiffs have since scaled back their request; they now ask the Court to: (1) enjoin NSI from transferring any funds to Science Applications International Corporation (SAIC), which may or may not be its parent corporation, (2) appoint a Special Master in this case, (3) enjoin NSI to place all fees collected for yearly renewal of domain names and for reservation of domain names for future use into a trust account specified by the Special Master, (4) order the General Accounting Office (GAO) to perform an audit of NSI to determine the company's actual cost of

13. Plaintiffs originally asked for a temporary restraining order, but they agreed to drop that request and to seek only a preliminary injunction.

providing registration and renewal services, (5) order NSI to make available to GAO all relevant records, and (6) enjoin NSI to return to NSF any intellectual property that NSF requests at the expiration of the Cooperative Agreement. Even with this scaling back, however, plaintiffs still ask the Court to enter an injunction that cuts a broad swath through NSI's corporate operations. Plaintiffs base their request for injunctive relief on the claims set forth in Count Two and Counts Four through Ten of their Amended Complaint, which allege that the system under which NSI is permitted to charge fees for the registration of domain names is illegal.

The standard for preliminary injunctions is dictated by Federal Rule of Civil Procedure 65(a). Under that Rule, the Court may grant preliminary injunctive relief if the moving party demonstrates (1) that it is likely to succeed on the merits of the claim, (2) that it will suffer irreparable harm if not granted injunctive relief, (3) that other parties will not suffer substantial harm, and (4) that the public interest is served by an injunction. Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C.Cir.1977). The standard is essentially a balancing test; the Court examines each requirement in light of the others to determine whether an injunction would be proper. Id. at 843.

Plaintiffs are unable to show sufficient irreparable injury to justify the broad relief that they request. In addition, there is a substantial risk of harm to defendant NSI and to the general public if the Court orders such a comprehensive injunction. Finally, plaintiffs have not shown a substantial likelihood of success on the merits; indeed, the Court will

dismiss most counts of plaintiffs' Amended Complaint for failure to state a claim upon which relief could be granted.

A. Irreparable Injury

The threat of irreparable injury is perhaps the key reason to grant a motion for preliminary injunction. See e.g., Buckingham Corp. v. Karp, 762 F.2d 257, 262 (2d Cir.1985). In the present case, plaintiffs cannot demonstrate that they would suffer any injury if the Court denies their motion. Plaintiffs seek only to remedy their economic injury; courts are generally reluctant to grant injunctions to protect such injuries, unless there is evidence that the defendant plans a substantial dissipation of assets, so that no economic judgment could be satisfied. See e.g., Deckert v. Independence Shares Corp., 311 U.S. 282, 290, 61 S.Ct. 229, 85 L.Ed. 189 (1940) (Substantial evidence that defendant on brink of insolvency, and that it was about to pay out remaining funds); U.S. v. Singer, 889 F.2d 1327, 1331 (4th Cir.1989) (Company has planned sales of bulk of assets); Tri-State Generation and Transmission Ass'n v. Shoshone River Power, Inc., 805 F.2d 351, 355-56 (10th Cir.1986) (Company has firm plans to sell assets and distribute proceeds to members); Foltz v. U.S. News & World Report, 760 F.2d 1300 (D.C.Cir.1985) (Planned distribution from pension fund threatened to dissipate most of fund's assets).

Plaintiffs fail to demonstrate that they would have any trouble collecting a judgment from defendants. There is no allegation that NSI is in danger of going out of business, or of being unable to satisfy a later judgment. In addition, there is little evidence that NSI plans to dissipate any assets. At

most, plaintiffs allege that NSI will transfer money to its former parent, SAIC, but plaintiffs do not present any evidence that such transfers will substantially reduce NSI's capital. Furthermore, there are no allegations that NSI is on the verge of insolvency, or that it will cease to return profits from which to pay a judgment. Indeed, plaintiffs argue in this case that NSI makes a 300% profit on each registration; if that is true, then NSI is perhaps too profitable, not teetering on the brink of collapse.

For these reasons, plaintiffs have not shown that they are threatened with any irreparable injury that is sufficient to warrant injunctive relief.

B. Injury to Other Persons

NSI would likely have suffered substantial harm under plaintiffs' original request, since a freeze of nearly $90 million would potentially have halted NSI's business activity and sent its stock into a freefall. Plaintiffs' modified request — a ban on transfers to SAIC and the deposit of certain fees into a trust account — might not have such a substantial effect, especially since NSI maintains that it does not plan any substantial transfers to SAIC in the near future. However, it would have some deleterious effect, if only by tying NSI's hands in the operation of its business affairs.

Plaintiffs' request certainly threatens some harm to the general public. Several hundred thousand persons seek to register domain names every month. If the Court entered an injunction that affected NSI's business activity and that harmed the domain registration process, the public might

suffer real, tangible injury. Although this injury is not so substantial as to prove dispositive, it certainly tips the scales against plaintiffs' motion.

C. Success on the Merits

Finally, plaintiffs cannot show a likelihood of success on the merits. The Court has granted plaintiffs summary judgment on Count One, but this motion does not implicate that count. As the Court will describe below, it must dismiss all plaintiffs' other counts. Therefore, plaintiffs have no prospect of success on the merits of the claims upon which this motion is based. For this reason, the Court must deny plaintiffs' motion.

IV Defendants' Motions to Dismiss

Both NSI and NSF move to dismiss plaintiffs' Amended Complaint in its entirety, for failure to state a claim, or, in the alternative, for summary judgment on all counts. As the Court has indicated above, plaintiffs are entitled to summary judgment on Count One of the Amended Complaint, but the claims in Count Three lack merit. Therefore, the Court will deny defendants' motions as to Count One, but grant it as to Count Three.

As to the remaining eight counts, dismissal is appropriate "only if 'it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations.' " Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Martin v. Ezeagu, 816 F.Supp. 20, 23 (D.D.C.1993). In evaluating a motion to dismiss, the Court

must construe the complaint in the light most favorable to plaintiff and give plaintiff "the benefit of all inferences that can be derived from the facts alleged." Schuler v. United States, 617 F.2d 605, 608 (D.C.Cir.1979).

Plaintiffs' remaining counts concern alleged improprieties by NSF and NSI in regard to the adoption of Amendment 4 to the Cooperative Agreement. Plaintiffs first allege that the fees charged by NSI for initial registration and for yearly renewal fees are illegal taxes (Count Two), that they violate the IOAA (Count Four), and that they were adopted in violation of the APA (Count Five). Plaintiffs also allege that NSI collects fees for services to be performed after the Cooperative Agreement expires, in violation of the Agreement (Count Six), and that these fees also are illegal taxes, violate the APA, and violate the IOAA (Count Seven). Plaintiffs further argue that the Cooperative Agreement itself violates Article IV, § 3 of the Constitution, which governs transfers of federal property (Count Eight). Finally, plaintiffs argue that the arrangement between NSI and NSF creates antitrust violations under the Sherman Act (Counts Nine and Ten).

Defendants argue that each of these counts fails to state a claim upon which relief could be granted.[14]

14. Defendants also argue that plaintiffs' claims are barred by the doctrine of laches. However, plaintiffs present substantial allegations that defendants' hands are dirtied by illegal dealings; therefore, defendants' may be barred from asserting the laches defense. See e.g., Pfieffer v. CIA, 60 F.3d 861, 865 (D.C.Cir.1995). Furthermore, in light of the secretive nature in which Amendment 4 emerged, and given NSI's reluctance to release details about its operation, plaintiffs' 18 month delay in bringing suit cannot be considered inexcusable.

Appendix C

A. Registration and Renewal Fees (Counts Two, Four, Five)

Plaintiffs first attack NSI's share of the registration and renewal fees (the "NSI fees"), which make up 70% of total collections.[15] Plaintiffs assert that these fees greatly exceed NSI's cost of providing the services; therefore, plaintiffs argue that collecting these fees is illegal and violates the Constitution (Count Two), the provisions of the IOAA (Count Four), and the APA (Count Five).

1. Constitutional Violation

Plaintiffs argue that, to the extent that the NSI fees exceed costs, they are a tax, not a fee for service. Since it is undisputed that Congress did not impose this charge and has not ratified it, plaintiffs argue that the fee is illegal under Article I, § 8 of the Constitution.

This argument is similar to the argument that plaintiffs present in favor of their motion for summary judgment. However, the NSI fees are substantially different than the Preservation Assessment, and they are not taxes under any of the criteria that the Court applied above. First, the Preservation Assessment fees are collected for government use, while the government does not benefit in any way from the NSI fees, because NSI keeps them for itself. Therefore, the NSI fees do not raise any revenue for the government.

In addition, unlike the Preservation Assessment, the NSI fees are paid as a true fee for services. It is undisputed that

15. NSI's share is $70 of the $100 initial fee and $35 of the $50 renewal.

the Preservation Assessment is simply an added-on charge; it is in no way linked to the registration services, except that anyone paying for the services is also required to pay the assessment. In contrast, however, the NSI fees are linked to the registration services — they are payments to cover costs and profits for NSI, the entity that provides the services.

Furthermore, plaintiffs paid the NSI fees pursuant to a voluntary contract between private parties. Plaintiffs argue that their contracts with NSI are not voluntary, because NSF, a government agency, has stacked the system so that users are forced to contract with NSI to receive the services they need. However, a contract is not involuntary because it flows from a monopoly, even if the government (or its agent) holds that monopoly, as long as the monopolist is merely servicing an existing need, and has not created the need itself. See Yosemite Park and Curry Co. v. United States, 231 Ct.Cl. 393, 686 F.2d 925, 931-32 (Cl.Ct.1982). Thus, in Yosemite, the Park Service was a monopolist provider of electricity to park merchants, and it set its rates above cost, at a market rate. The court held that the government did not create the need for electricity, but merely serviced the need that the merchants themselves created. Therefore, the fee was not illegal.

The present situation is similar. There is no arbitrary need for NSI's services; NSI does not provide a government-mandated license, for example. Instead, NSI provides a service that plaintiffs and other users would desire, even if the government were never involved. Therefore NSI can charge a market rate, even though it exceeds costs, and even if it is acting as a government agent, as plaintiffs assert.

The NSI fees are not collected as revenue for the federal government; they are paid pursuant to a voluntary contract between two private parties, and they are paid as value for services rendered and received. Therefore, plaintiffs cannot demonstrate that the NSI fees are a tax, much less an illegal one. For this reason, the Court will dismiss Count Two of the Amended Complaint.

2. IOAA

Plaintiffs next contend that the NSI fees violate the IOAA, which requires that fees charged for federal services must be set according to certain criteria, particularly the cost and value of those services. 31 U.S.C. § 9701. The Supreme Court has held that the cost of the service is primary among all criteria. National Cable, 415 U.S. at 343, 94 S.Ct. 1146. Therefore, plaintiffs' allegations that NSI sets its rates substantially in excess of costs might implicate the IOAA.

The problem, however, is that the statute applies only to a "service or thing of value provided by an agency." 31 U.S.C. § 9701(b). NSI is clearly not a federal agency, and the NSI fees are clearly not charged by a federal agency for federal services. Plaintiffs argue that NSI is a quasi-federal actor,[16] but this allegation is still insufficient to bring

16. Plaintiffs argue that a private individual can be considered a de facto federal actor, subject to federal constitutional and statutory constraints. See e.g., Berger v. Hanlon, 129 F.3d 505 (9th Cir.1997); Dobyns v. E-Systems, 667 F.2d 1219 (5th Cir.1982). However, while defendants' conduct may bring them within the reach of these cases, the cases do not suggest that a private actor is subject to administrative, agency regulations such the IOAA.

NSI within the scope of the IOAA, which extends only to fees charged by agencies for their products and services. Therefore, the Court must dismiss Count Four of the Amended Complaint.

3. APA and Registration Fees

Plaintiffs also argue that the imposition of fees in Amendment 4 violates the APA. That statute requires safeguards on agency action such as notice of a rulemaking, comment on the rulemaking, and a statement of purpose by the agency. See e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C.Cir.1977). There is no dispute that NSF did not undergo any rulemaking procedures or issue any public findings or statement of reasons to support Amendment 4, which created the present fee structure.

Plaintiffs present two arguments that implicate the APA. First, they argue that the fees violate the IOAA, which means that they presumptively violate the APA. Second, plaintiffs argue that, because these fees were set without notice and comment, and because NSF never produced a statement of its reasons, they violate the APA. See e.g., Engine Manufacturers Ass'n v. E.P.A., 20 F.3d 1177, 1181-83 (D.C.Cir.1994) (APA requires that agency setting fees must release public findings to support decision); Federal Election Comm'n v. Rose, 806 F.2d 1081, 1088 (D.C.Cir.1986) (Agency action without explanation presumptively violates APA).

The Court has described that the IOAA does not apply to the NSI fees; therefore, plaintiffs' first argument lacks

merit. As to the second argument, the statute excepts from the notice and comment requirement all matters that involve "public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2). The exception is intended to grant agencies latitude to engage in contracts; the potential public impact of a contract does not divest the exception of its force. Humana of South Carolina, Inc. v. Califano, 590 F.2d 1070, 1083-84 (D.C.Cir.1978); Duke City Lumber v. Butz, 382 F.Supp. 362, 374 (D.D.C.1974) (Agency has wide discretion under public contracts exception to decide what, if any, rulemaking to follow). The Cooperative Agreement clearly concerns a public contract. As such, it falls within the § 553(a)(2) exception. For this reason, the APA does not apply to the NSI fees, and the Court must dismiss Count Five of the Amended Complaint.

B. Fees for Future Services (Counts Six and Seven)

Plaintiffs also allege that NSI is charging fees for "future services;" that is, services which are scheduled to be performed in whole or in part after the Cooperative Agreement expires. Plaintiffs allege that NSI is receiving full payment for these services, even though it may not play a role in providing those services after September 1998. Included among these future services are a $49 fee for reservation of a domain name[17] and the fees for certain

17. This fee is different from the registration fee. It enables a user who foresees a need for a certain name to reserve that name for future use, without immediately paying a registration fee. Thus, a user can pay $49 to reserve the name now — foreclosing another user from taking the name — and only begin to pay registration and maintenance charges when ready to use the name.

renewals and initial registrations.[18] Plaintiffs argue that collection of these fees violates the Cooperative Agreement (Count Six), that the fees are illegal taxes, and that the fees violate the IOAA and the APA (Count Seven).

The Court must dismiss Count Six, because plaintiffs are suing to enforce the Cooperative Agreement, even though they are not parties to the contract. Clearly, plaintiffs lack standing to directly enforce the Agreement, there is no suggestion that they have third party standing. See e.g., Beckett v. Air Line Pilots, 995 F.2d 280, 286 (D.C.Cir.1993) (Third party may challenge contract only if contracting parties intended to create enforceable contract rights in the third party). Therefore, if indeed NSI is violating the Agreement, it is up to NSF, or some other proper party, to take action.

Plaintiffs make a strong showing that NSI is reaping a substantial profit in excess of its cost. The charge for maintenance beyond September could be a huge windfall if NSI's contract expires and the company never has to provide that service. More strikingly, the $49 fee to reserve a name is payment for a service that costs NSI nothing; the company does not really register or maintain anything, it only puts a name on hold.[19]

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18. Plaintiffs allege that every renewal received after September 1997 and every initial registration received after September 1996 is a future charge, because it obligates NSI to perform some maintenance services beyond the expiration of the Cooperative Agreement.

19. NSI does not assert that name reservation for future use creates any significant opportunity costs.

Despite strong evidence that NSI's fees greatly exceed its costs of providing these future services, plaintiffs make essentially the same arguments as they do in Counts Two, Four, and Five. The Court's analysis must be essentially the same as well. As discussed in Subsection A, above, these privately collected, privately retained fees are certainly not a tax, and plaintiffs cannot show that NSI is subject to the restrictions of the IOAA or of the APA.

Thus, although plaintiffs present strong evidence to suggest that NSI has used its position to charge fees that greatly exceed their costs, plaintiffs have not stated a claim against the company. Plaintiffs lack standing to bring suit for violation of the Cooperative Agreement, and they do not have a cause of action under Article I, § 8 of the Constitution, the IOAA, or the APA. For these reasons, the Court must dismiss Counts Six and Seven.

C. Disposal of Property (Count Eight)

Article IV, § 3 of the Constitution provides that only Congress has the power to dispose of property of the United States. Plaintiffs argue that NSF violated this clause by disposing of federal property — the domain name registry, and perhaps some hardware and software — when it entered into the Cooperative Agreement.

Congress authorized NSF to dispose of this property, however. In NSF's enabling legislation, Congress empowered the agency to "foster and support" the development of computer technology. 42 U.S.C. § 1862(a),(g). In order to ease this mission, Congress

empowered the NSF "to hold and dispose of by grant, sale, lease or loan, real or personal property of all kinds necessary for, or resulting from, the exercise of authority granted by this chapter." 42 U.S.C. § 1870(e). Because Congress has authorized NSF to dispose of property in pursuit of its statutory objectives, the disposal of property by NSF does not offend the Constitution. For this reason, the Court must dismiss Count Eight of the Amended Complaint.

D. Sherman Act (Counts Nine, Ten)

Finally, plaintiffs assert that NSI and NSF are engaged in a conspiracy to create a monopoly (Count Nine) and that NSI is operating as an illegal monopoly (Count Ten), in violation of the Sherman Act. It is clear, however, that NSF, as an agency of the federal government, is immune from suit under the Sherman Act. Sea-Land Service, Inc. v. Alaska Railroad, 659 F.2d 243, 245- 47 (D.C.Cir.1981), cert. denied, 455 U.S. 919, 102 S.Ct. 1274, 71 L.Ed.2d 459 (1982). Therefore, Count Nine must be dismissed as to NSF, on the grounds that it is immune from suit.

NSI also asserts immunity from suit. Under the federal instrumentality doctrine, private parties acting in compliance with a clearly articulated government program are immunized to the same extent as the government entity. Southern Motor Carriers Rate Conf. v. United States, 471 U.S. 48, 56-57, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985); IT & E Overseas, Inc. v. RCA Global Communications, Inc., 747 F.Supp. 6, 11-14 (D.D.C.1990). For example, in IT & E, a private telephone company that had contracted with the Guam legislature and the United States Navy to provide long

distance service on Guam was immune from suit under the Sherman Act, by virtue of its contract with the federal agents.

This doctrine applies to NSI in the present case. Plaintiffs make reasonable allegations that NSI is a monopolist, but the monopoly results from the Agreement between defendants. Because NSI is acting in compliance with a government cooperative agreement, therefore, it is entitled to immunity from suit under the Sherman Act.[20] For this reason, the Court must dismiss Counts Nine and Ten of the Amended Complaint.[21]

VII Conclusion

Plaintiffs have filed motions for summary judgment on Counts One and Three of the Amended Complaint, and for a

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20. The Supreme Court's Opinion in Otter Tail Power Co. v. U.S., 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), cited by plaintiffs, does not suggest otherwise. In that case, the Court held that power companies were not immunized merely because the Federal Power Act required that they provide electrical connections to small communities. However, in Otter Tail, there was no contract between the private companies and any federal agency; therefore there was no immunity. In the present case, there is such a contract between NSF and NSI.

21. Plaintiffs assert that the Justice Department is investigating NSI for violations of the Sherman Act in connection with the Cooperative Agreement. That bare allegation, however, does not provide the Court with sufficient reason to disregard NSI's immunity. Furthermore, without more information about the investigation, it is unclear that plaintiffs would have standing to bring a claim.

preliminary injunction based on all other counts, and defendants have filed motions to dismiss all counts. Plaintiffs are entitled to summary judgment on Count One, because they have shown that the Preservation Assessment is an illegal tax, but not on Count Three, because they have not shown that the assessment is covered under the IOAA.

The Court must deny plaintiffs' motion for a preliminary injunction, because plaintiffs do not show irreparable injury and do not show that the balance of equities tips in their favor. Moreover, because the Court will dismiss plaintiffs' remaining claims, they cannot show a likelihood of success on the merits.

The Court will grant summary judgment for plaintiffs on Count One; therefore, the Court must deny defendants' motions to dismiss as to that count. As to all other counts, however, plaintiffs fail to state a claim upon which relief can be granted. For this reason, the Court will grant defendants' motions and dismiss Counts Two through Ten.

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AND FILED FEBRUARY 2, 1998

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

WILLIAM THOMAS, et al.,

Plaintiffs,

v.

NETWORK SOLUTIONS, INC, and NATIONAL SCIENCE FOUNDATION

Defendants.

Civ. No. 97-2412 (TFH)

MEMORANDUM OPINION

Pending before the Court is plaintiffs' motion for a preliminary injunction. Plaintiffs have asked the Court to enjoin defendants from spending any funds contained in or allocated to the "Intellectual Infrastructure" fund. After considering the submissions of both parties and the arguments made before the Court on January 16, 1998, the Court will grant plaintiffs' motion.

I. Parties and Plaintiffs' Motion

Plaintiffs in this case are a group of two individuals and four companies, each of whom has registered a domain name

for use on the Internet. Plaintiffs have filed a motion for certification as a class, to represent the class of all such registrants. That motion is not yet ripe for decision.

Defendant National Science Foundation ("NSF") is an independent agency of the United States government. Among its other responsibilities, it is involved in regulating the Internet. Defendant Network Solutions, Inc. ("NSI"), is a private company that entered into a cooperative agreement with NSF. Under the terms of that agreement, which is scheduled to expire later this year, NSI manages and maintains the registry of domain names.[1]

Plaintiffs' Complaint, which contains eleven counts, alleges that defendants have entered into an illegal arrangement, whereby NSI, under the authority of NSF, holds a monopoly over the registration of domain names. Plaintiffs allege that, pursuant to this monopoly, NSI has illegally collected fees from prospective registrants of domain names. Plaintiffs' motion for preliminary injunction, however, focuses only on one part of those fees — the portion allocated for deposit in the Intellectual Infrastructure Fund ("Fund"). Plaintiffs contend that the forced contribution to the Fund is

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1. Domain names are the alphanumeric monikers that ease the use of the Internet. Computers are linked on the Internet by "IP addresses," which are each composed of a long string of numbers. Each computer or user has a unique number, so that information can be directed to a specific destination, by using the IP address. The domain name is a more accessible, more memorable, occasionally catchy, title that can be attached to an IP address. However, domain names must be unique, to avoid confusion in delivery. Therefore, there is a need for a registry of names, to prevent duplication.

an illegal tax, and they ask that defendants pay restitution for collection of that tax. In the present motion, plaintiffs ask the Court to enjoin all expenditure of those funds, pending a resolution of the claim on its merits.

II. Factual Background

Defendant NSF maintained the registry of domain names from the 1980's until 1993. In 1993, NSF awarded NSI with a contract to maintain the registry for five years, with the possibility of a short extension. The award was made through a cooperative agreement, after a competitive bidding. The contract called for NSI to operate on a "cost-plus-fee" basis, which meant that NSI received reimbursement for its costs, plus a fixed fee that represented the company's profit. Under this original contract, the costs and fees were paid by NSF out of its operating budget; users did not have to pay any fees or taxes to register or to maintain domain names.

In September of 1995, NSF and NSI entered into an amendment of that contract. This amendment eliminated the "cost-plus-fee" method of compensation. In its place, it permitted NSI to charge fees for the registration and maintenance of domain names, which meant that, for the first time, users had to pay to register and maintain their domain names. The amendment set the fees at $100 to register and at $50 for annual renewal.[2] Since 1995, NSI has been solely responsible for collecting these fees.

The amendment did not contemplate that NSI would keep the entire fee as reimbursement for costs and profit,

2. The fee for initial registration also covered the maintenance of the name for the first two years.

however. Instead, NSI keeps 70% of each fee[3] for itself and places the remaining 30% into the Intellectual Infrastructure Fund. That 30% contribution is commonly known as the "Preservation Assessment." NSI is responsible for maintaining the Fund, but the government directs the expenditure of monies from the Fund.

As of September 30, 1997, the Fund contained at least $37 million. In October of 1997, Congress passed the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, Pub. L. No. 105-65, 111 Stat. 1344 (1997), which authorized an expenditure of $23 million on the "Next Generation Internet" program. The Next Generation program is aimed primarily at upgrading the Internet infrastructure, improving the speed and accuracy of information delivery, and increasing access for schools. It is a safe presumption that the money for the project will come out of the Intellectual Infrastructure Fund.[4]

As of today, NSF has not begun to spend any of the Next Generation funds. However, there is no legal impediment to these expenditures, and NSF could begin funding the program at any time.[5]

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3. That comes to $70 of each initial registration and $35 of each annual renewal.

4. The statute does not mention the Fund by name, but there is no dispute that Congress intended it to be the source of money for the Next Generation project.

5. NSF has, however, agreed to refrain from spending on this project until the Court has issued its decision on plaintiffs' motion.

Appendix D

III Standard for Decision

The standard for preliminary injunctions is dictated by Federal Rule of Civil Procedure 65(a). Under that Rule, the Court may grant preliminary injunctive relief if the moving party demonstrates (1) that it is likely to succeed on the merits of the claim, (2) that it will suffer irreparable harm if not granted injunctive relief, (3) that other parties will not suffer substantial harm, and (4) that the public interest is served by an injunction. *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977). The standard is essentially a balancing test; this means that the Court examines each requirement in light of the others to determine whether an injunction would be proper. *Id.* at 843.

IV Success on the Merits

Plaintiffs assert that the Preservation Assessment is an illegal tax, and that defendants should ultimately be compelled not only to cease collecting these taxes, but also to refund monies already collected. In the present motion, plaintiffs merely ask the Court to freeze the fees already collected[6], and to prevent their expenditure until the Court has reached a decision on the merits.

Plaintiffs show a substantial likelihood of success on the merits. It is undisputed that only Congress has the power to levy taxes. U.S. Const., Art. 1, Sec. 8; *National Cable*

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6. The Preservation Assessment is comprised entirely from these fees, and has not other sources of deposit.

Television Ass'n. Inc. v. United States, 415 U.S. 336, 340 (1974); *Bell Atlantic Telephone Cos. V. Federal Communications Commission*, 24 F.3d 1441, 1445 (D.C. Cir. 1994). Thus, since NSF levied the Preservation Assessment, it would be illegal, if it is a tax on domain registration.

Plaintiffs can prevail on the merits only if they demonstrate two things. First, plaintiffs must show that the Preservation Assessment is a tax, which NSF cannot oppose, and not a mere regulatory fee, which NSF can legally impose. Second, they must demonstrate that Congress has not ratified the tax, so that its collection is no longer illegal.

A. Character of the Assessment

There is no litmus paper onto which the Court can drop a regulatory assessment such as this one, hoping to see whether the paper comes up blue for tax or pink for fee. However, other courts have suggested several criteria that are useful for the Court's consideration.

The Supreme Court and other courts have defined a tax as a payment which is arbitrarily imposed for some public purpose, whereas a fee is payment for a voluntary act, such as requesting a permit, that goes to defray the expenses of regulating that act. *National Cable*, 415 U.S. at 340; *Williams v. Motley*, 925 F.2d 741, 743 (4th Cir. 1991); *United States v. Maryland*, 471 F.Supp. 1030, 1036 (D. Md. 1979); *In Re Farmers' Frozen Food Co.*, 221 F.Supp. 385 (N.D. Cal. 1963).

Other courts have focused more specifically on the benefits conferred by an assessment. These courts held that

a payment is a tax when it confers no special benefit on the payee, or when the assessment is intended to raise general revenue; in contrast, a fee gives the payee value for payment, in the form of defraying the regulatory expenses necessary to keep certain services active. *See Cumberland Farms, Inc. v. State of Maine*, 116 F.3d 945, 946-47 (1st Cir. 1997); *United States v. River Coal Co., Inc.*, 748 F.2d 1103, 1106 (6th Cir. 1984); *Butler v. Maine*, 767 F.Supp. 17, 19 (D. Me. 1991).

Finally, some courts have looked at the service provided by the agency, in exchange for the regulatory assessment. These courts held that the assessment may be a tax if it is not fairly tied to both the value received by the payee and to the cost of the service to the agency. *See Massachusetts v. United States*, 435 U.S. 444, 464 (1978); *United States Shoe Corp. V. United States*, 114 F.3d 1564, 1571 (Fed Cir. 1997). Because the payee did not receive a benefit commensurate to the value of the assessment, or because the agency charged in excess of its costs and expenses, these courts held that the assessment was a tax.

Plaintiffs have made a substantial showing that the Preservation Assessment can be considered a tax under any or all of these formulae. There is no dispute that the assessment is involuntary–it is automatically charged to every domain registration.[7] Since there is no dispute that the

7. Domain registration is a voluntary act; however, this does not render the Preservation Assessment voluntary, because the assessment is not really a charge for registration, but is instead a payment above and beyond the cost of the registration itself. *See e.g., Williams v. Motley*, 925 F.2d at 743; *River Coal*, 748 F.2d at 1106.

Preservation Assessment Fund exists to pursue general, public internet projects and goals, plaintiffs have made a strong showing that the assessment is collected for a public purpose, and not to defray defendants' regulatory costs. Finally, defendants admit that the cost of providing the initial registration service is only $70; the additional $30 paid is the Preservation Assessment, which exceeds the cost of regulation by nearly 50%.[8] For these reasons, plaintiff has demonstrated a substantial likelihood that the Preservation Assessment is a tax that was not imposed by Congress.

B. Ratification

Even if the Preservation Assessment is an illegal tax, it still might not violate the Constitution. Unlike the Supremacy Clause of the Constitution—which, among other things, bars states from collecting certain taxes from the federal government—Article I, Section 8, does not bar taxes absolutely. It merely requires that Congress, not some other authority, impose the taxes. Thus, if Congress imposes a tax, it is legal under Article I, Section 8. Similarly, if Congress later ratifies a tax, it is proper under the Constitution, even though the Congressional approval might postdate the initial imposition and collection of the tax. *United States v. Heinszen*, 206 U.S. 370, 390 (1907); *Canisius College v. United States*, 799 F.2d 18, 25 (2d Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987). Therefore, if Congress ratifies the Preservation Assessment, its collection is legal; even the past collection of monies is retroactively legal.

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8. There is a similar disparity in the yearly renewal fees, $35 of which go to cover costs, with $15 going to the assessment.

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Congress has addressed the issue of the Preservation Assessment, if only indirectly. In the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, Pub. L. No 105-65, 111 Stat. 1344 (1997), Congress authorized NSF to expend up to $23 million on the President's Next Generation Internet project. The House and Senate Reports indicate that Congress implicitly directed that these monies be withdrawn from the Intellectual Infrastructure Fund.

Defendants argue that this Act represents a Congressional ratification of the Preservation Assessment. However, there are two reasons why the Act cannot, on its own, effect a ratification. First, ratification is a legislative function, and it is well recognized that Congress does not normally legislate through appropriations bills. *See e.g., National Audubon Society v. Andrus*, 442 F.Supp. 42, 45 (D.D.C. 1977). Thus, while Congress could effect a ratification through an appropriations bill, it can do so only if it clearly states its intention to do so. *Associated Electric Coop. V. Morton*, 507 F.2d 1167, 1174 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 830 (1975).

Second, and more importantly, it is clear that legislation can effect a ratification only if Congress clearly recognizes the unauthorized tax and specifically states that the tax is ratified. For example, the legislation at issue in *Heinszen* effected a valid ratification of taxes collected by the military in the Phillippines only because the statute recognized that the taxes had been illegally collected, and because Congress stated that those taxes "are hereby legalized and ratified." *See Heinszen*, 206 U.S. at 381.

In the present case, Congress has not ratified the Preservation Assessment. Indeed, the appropriations act cited by defendants never even mentions the assessment or the Intellectual Infrastructure Fund by name. Congress may have intended to grant NSF the authority to collect the assessment, but it has not effected a legal ratification.

There is no debate that, if Congress wishes to authorize collection of the assessment, at any time, it may ratify this collection through a clear recognition of the tax and through specific ratification language, as described in *Heinszen.* However, Congress has not yet chosen this path.

C. Conclusion

Therefore, plaintiffs have demonstrated that they have a substantial likelihood of eventual success on the merits of these claims. They have made a significant showing that the Preservation Assessment is an illegal tax. Furthermore, they have shown that Congress has not yet ratified that assessment. Therefore, plaintiffs have made a substantial. showing that defendants may have collected, and may currently be collecting, the assessment illegally.

V Balance of Harms

In addition to considering plaintiffs' likelihood of success on the merits, the Court must also consider the irreparable harm that plaintiffs face if denied an injunction, the potential harm to defendants if they are enjoined, and the public's interest. The Court finds that plaintiffs face some potentially irreparable harm, that defendants face little harm,

if any, and that the public's interest would not be substantially affected by an injunction.

A. Plaintiffs' Irreparable Harm

Plaintiffs are seeking, among other things, the return of the monies they have paid into the Intellectual Infrastructure Fund. As of today, defendants have not yet expended any of those funds, but they are authorized by Congress to spend up to $23 million at any time. Plaintiffs would indeed face irreparable injury, if defendants spent that money and were unable to pay a judgment.

Defendants argue that, even if they spend from the Intellectual Infrastructure Fund, they could pay any judgment, either out of the NSF operating budget or out of the federal government's judgment fund. However, plaintiffs have raised a substantial issue that NSF might not have available money in its budget and that an award in this case might not be compensable from the judgment fund. Therefore, there is a real possibility that defendants may, in essence, be judgment proof, if they spend the Intellectual Infrastructure money. Therefore, plaintiffs have shown at least some potential for irreparable injury.

B. Defendants' Harm

In contrast, defendants face no harm whatsoever. Defendant NSI is merely the caretaker for the Preservation Assessment Fund; therefore, it has no interest in what happens to the money. Defendant NSF also has no tangible interest in the money; it may only spend the funds at the

direction of Congress, for purposes specified by Congress. Therefore, NSF is not harmed by a delay in the expenditure of these funds.

C. The Public Interest

The public may have some interest affected by an injunction. Congress and the President determined that the Next Generation Internet project would serve an important public interest and directed NSF to spend up to $23 million on that project. An injunction in this case would most likely delay any expenditure on that project until a final determination on the merits.[9] This would effect some harm on the public.

However, the harm to the public is merely a delay in implementing the project, and the overall harm occasioned by such a brief delay would likely be minimal. Furthermore, the public has some additional interest that the courts prevent agencies from circumnavigating the Constitution and imposing illegal taxes. Therefore, the Court finds that the public interest does not weigh against an Injunction.

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9. Of course, an injunction would not actually bar spending on the Next Generation project, but would only bar spending out of the Preservation Assessment Fund. Defendant NSF would remain free to spend money from other sources on the project. However, the pleadings suggest that if funding for the Next Generation project does not come from the Preservation Assessment Fund, it will not come at all.

Appendix D

VI Conclusion

Under the *Holiday Tours* standard, the Court is directed to consider plaintiffs' likelihood of success on the merits of their claim, the irreparable harm plaintiffs face if not granted injunctive relief, the harm that defendants will face if enjoined from action, and the public interest served by an injunction. *Holiday Tours, Inc.*, 559 F.2d at 842-43. As the Court has described above, it finds that these factors weigh in favor of granting injunctive relief. Plaintiffs have demonstrated that they have a very substantial likelihood of success on the merits of this claim. Furthermore, while plaintiffs face potentially irreparable harm, defendants face no harm at all. Finally, the public interest will not be substantially affected by an injunction, which will at most delay expenditure on the Next Generation Internet project. For these reasons, the Court will grant plaintiffs' motion for preliminary injunctive relief.

An order will accompany this opinion.

February 2nd, 1998

s/ Thomas F. Hogan
Thomas F. Hogan
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

WILLIAM THOMAS, et al.,

Plaintiffs,

v.

NETWORK SOLUTIONS, INC, and NATIONAL SCIENCE FOUNDATION

Defendants.

Civ. No. 97-2412 (TFH)

ORDER

For the reasons stated in the Court's Memorandum Opinion, it is hereby

ORDERED that plaintiffs' motion for a preliminary injunction is **GRANTED;** it is further

ORDERED that defendants are enjoined from crediting, spending, obligating, or using any of the money collected for, placed into, or taken from the "Intellectual Infrastructure" fund account, pending final adjudication of this matter.

February 2nd, 1998

s/ Thomas F. Hogan
Thomas F. Hogan
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING *EN BANC* DATED AND FILED JULY 8, 1999

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-5502

September Term, 1998
97cv02412

William Thomas, et al.,

Appellants

v.

Network Solutions and National Science Foundation,

Appellees

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX E1 — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 8, 1998

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-5502

September Term, 1998
97cv02412

William Thomas, et al.,

Appellants

v.

Network Solutions and National Science Foundation,

Appellees

BEFORE: Randolph, Rogers and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed June 28, 1999, it is

ORDERED that the petition be denied.

Appendix E1

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX F — 31 U.S.C. 9701 AND H.R. 3579

§ 9701. Fees and charges for Government services and things of value

(a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.

(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be

(1) fair; and

(2) based on —

(A) the costs to the Government;

(B) the value of the service or thing to the recipient;

(C) public policy or interest served; and

(D) other relevant facts.

(c) This section does not affect a law of the United States

—

(1) prohibiting the determination and collection of charges and the disposition of those charges; and

(2) prescribing bases for determining charges, but a charge may be redetermined under this section consistent with the prescribed bases.

* * * *

Appendix F

ONE HUNDRED FIFTH CONGRESS
OF THE
UNITED STATES OF AMERICA

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the twenty-seventh day of January, one thousand nine hundred and ninety-eight

An Act

Making emergency supplemental appropriations for the fiscal year ending September 30, 1998, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 1998, and for other purposes, namely:

TITLE I — EMERGENCY SUPPLEMENTAL APPROPRIATIONS FOR THE DEPARTMENT OF DEFENSE

CHAPTER I

* * *

Sec. 8003. Ratification of Internet Intellectual Infrastructure Fee. (a) The 30 percent portion of the fee

charged by Network Solutions, Inc. between September 14, 1995 and March 31, 1998 for registration or renewal of an Internet second-level domain name, which portion was to be expended for the preservation and enhancement of the intellectual infrastructure of the Internet under a cooperative agreement with the National Science Foundation, and which portion was held to have been collected without authority in William Thomas et al., v. Network Solutions, Inc. and National Science Foundation, Civ. No. 97-2412, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had, by prior Act of Congress, been specifically authorized and directed.

(b) The National Science Foundation is authorized and directed to deposit all money remaining in the Internet Intellectual Infrastructure Fund into the Treasury and credit that amount to its Fiscal Year 1998 Research and Related Activities appropriation to be available until expended for the support of networking activities, including the Next Generation Internet.

* * *

Appendix F

Congressional Record
April 30, 1998
Page H2649

CONFERENCE REPORT ON H.R. 3579, 1998 (House of Representatives — April 30, 1998

General Provisions

* * *

Section 8003. The conferees have included a new section under 'General Provisions' which would serve to ratify and confirm Congressional intent with respect to the collection and use of funds by the National Science Foundation (NSF). The explosive growth of the commercial segment of the Internet resulted in the collection of program fees in excess of the amount projected. These were in turn held in an 'Intellectual Infrastructure Fund' until the Congress, as part of the fiscal year 1998 Appropriations Act, determined to use these funds for NSF's work on 'Next Generation Internet' activities. This action by the Congress has since been held up by proceedings in the federal court system, and the language included in this new section will statutorily correct the lack of authority perceived by the court. The conferees would not in this regard that the federal judge in this case literally invited this action by the Congress, which would do nothing more than permit the NSF to proceed with the use of these funds as intended by Public Law 105-65.

APPENDIX G — MATTER OF: RETENTION OF FEES RECEIVED BY EPA CONTRACTORS PROVIDING INFORMATION SERVICES TO THE PUBLIC, DATED OCTOBER 20, 1975

MATTER OF: RETENTION OF FEES RECEIVED BY EPA CONTRACTORS PROVIDING INFORMATION SERVICES TO THE PUBLIC:

Oct 20, 1975

Environmental protection agency is not precluded from offering those requesting information from it pursuant to freedom of information act the alternative of dealing directly with contractors EPA uses to process, store and retrieve its information, provided freedom of information requirements are not thereby avoided. Contractors filling such requests for information are acting as independent entrepreneurs and not agents of EPA, and are entitled to assess and retain fees charged for services rendered.

This decision to the administrator, United States Environmental Protection Agency (EPA) is in response to a request from Alvin L. Alm, assistant administrator for planning and management, EPA, for our views concerning the propriety of a procedure which EPA desires to use in furnishing to non-federal requesters, environmental-related information which is stored in information- handling systems operated by EPA contractors.

EPA states that it has a number of contracts with private firms under which contractors process, store, and facilitiate use of various kinds of recorded environmental related information. For example, under its computer time- sharing

contract with Optimum Systems, Inc., The contractor provides all the hardware and some of the software which enables storage and retrieval of data supplied by various EPA programs. Under its contract with berkey K. & L. Services, inc., The contractor develops films, makes various prints from the resulting negatives, and stores the negatives so that custom printing may be accomplished as directed by EPA. There also are other similar contracts, all of which have in common the provision by the contractor of processing, storage and retrieval facilities to allow use by EPA of data it has developed or compiled.

EPA also states that much of the environmental information in question is of value to non-federal parties, who from time to time (and in some cases, in great volume) request either copies of certain specific information (computer printouts, photographs) or direct access to data-processing systems via terminals. Epa advises that this information is available to the public under the freedom of information act and that it desires to make the information available to interested parties in the most useful manner. However, considerable costs are involved in providing such information or computer access to non-federal parties.

If EPA provides the environmental related information, either by obtaining it from the contractor and furnishing it to the requester, or by ordering the contractor to furnish it to the requester, EPA incurs considerable costs under the contract. While these costs are borne by funds appropriated to EPA, any charges which EPA may collect from the requester are not retained by the agency, but, instead, must be paid into the treasury as miscellaneous receipts pursuant

to 31 U.S.C. sec. 484 (1970). Thereafter, these funds are not available to EPA for obligation and expenditure except pursuant to an appropriation act.

For these reasons, EPA seeks our approval of a proposal by which it would be relieved of the tasks and the expenses of searching for and providing access to information. As we understand it, EPA will advise requesting parties to deal directly with the private company which provides the agency with its information-handling services instead. According to EPA, all of the information in the custody of its contractors is available to the public. The requesters and the contractors would reach their own arrangements and the contractor would charge and retain fees for the provision of the necessary services.

As we understand it from informal discussion with EPA staff, there are at least two advantages to this system for the requesting parties. First, the contractor will generally be able to provide the information more cheaply than EPA can. Second, where appropriate, the requester may be able to get direct access to data-processing systems via terminals. EPA emphasizes that it is desirous of making the information involved available to interested parties in the most useful manner and that both the requesters and EPA will benefit from use of this method.

However, in view of the provisions of 31 U.S.C. sec. 484 (1970) requiring monies received for the use of the United States to be deposited in the treasury as miscellaneous receipts, EPA has sought our decision as to the propriety of its proposal. In its view, where the contractor fills the request,

the United States is not providing any services and hence, is not entitled to charge any fees when the entire transaction occurs solely between the requester and firm holding the government contract.

As long as the proposed procedures are not used to delay or deny access to information or otherwise circumvent the intent or specific provisions of the freedom of information act, or the user charge statute, we have no objection to the EPA proposal. The congress has established certain standards for charging those persons for whom the government performs special services or provides access to information in its possession.

See the user charge statute, 31 U.S.C. sec. 483a (1970) and the freedom of information act, as amended, 5 U.S.C. sec. 552(a)(4). The latter statute provides for each agency to establish a uniform schedule of fees which are limited to reasonable standard charges for recovery of the direct costs of document search and duplication, which may be waived in the public interest. Neither that act nor any other statute authorizes the government to recover any of the costs associated with developing the information contained in the requested documents. It would be necessary, therefore, for EPA to assure, by including a provision to this effect in its agreement with its contractors, that the fees charged requesters by the contractor would not exceed the fees which EPA itself would be authorized to charge it if provided the service directly.

There is nothing in the freedom of information act or any other statute which would preclude EPA from offering

requesting parties the alternative of dealing with its contractors to obtain the desired information if the contractors can adequately fill the requests. Moreover, there is no authority for EPA to collect a fee where the service of providing the information is, in fact, rendered by someone other than the government or its agents. In this regard, especially since the requesters retain the right to deal with EPA, the contractors filling such requests are acting as independent entrepreneurs and not as EPA's agents. They will be working on their own time and using their own staff in filling requests they receive for information and they are entitled to assess and retain any fees charged for filling these requests.

Hence, in our view, such funds as may be received by these firms would not be moneys received *** for the use of the United States pursuant to 31 U.S.C. sec. 484 but instead would be for services rendered the requesters by those firms. As such, these funds clearly do not revert to the United States.

Accordingly, and provided that this method of handling requests for access to information is not used to thwart the provisions of the freedom of information act, we have no objection to EPA's proposal.

APPENDIX H — MATTER OF: FEDERAL ELECTION COMMISSION - SALES OF MICROFILM COPIES OF CANDIDATE AND COMMITTEE REPORTS, DATED MARCH 1, 1982

MATTER OF: FEDERAL ELECTION COMMISSION - SALES OF MICROFILM COPIES OF CANDIDATE AND COMMITTEE REPORTS

March 1, 1982

FEES - SERVICES TO THE PUBLIC - CHARGES - COLLECTION AND DISPOSITION - AGENCY RECORD DUPLICATION, ETC. - FEDERAL ELECTION COMMISSION

Federal election commission (FEC) proposal to have members of public who request microfilm copies of reports and statements filed with FEC pay firms which make copies is not legally objectionable. Procedure whereby FEC specifies schedule of fees in contract with duplicating firm, rather than reviewing each bill individually, would also be acceptable.

The chairman of the Federal Election Commission (FEC; Commission) seeks our approval of a proposed change in the procedure by which members of the public who request copies of candidate and committee reports are billed for the expenses of duplication. We have no legal objection to the proposed procedure, but recommend that the commission consider other systems which would minimize the administrative burden which is placed on the FEC.

The Federal Election Campaign Act of 1971 (FECA), as amended, provides in relevant part that:

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> The commission shall * * * within 48 hours after the time of the receipt by the commission of reports and statements filed with it, make them available for public inspection, and copying, at the expense of the person requesting such copying * * * . 2 U.S.C. 438(a)(4).

The chairman indicates that the FEC currently responds to requests for microfilm copies of reports by sending an unoriginal reel of the microfilm to a private firm for duplication. The FEC charges the requester a sum equal to the amount which the commission itself is billed. The payment from the requester is forwarded to treasury, while the amount due the private firm is paid from the FEC's appropriation. According to the chairman, the main problem with this current practice is that whenever copies of FECa (Federal Election Campaign Act of 1971, as amended) reports are duplicated, the commission must deduct such cost from its budget without the possibility of reimbursement.

Under the proposed procedure, the commission would continue to send unoriginal reels of microfilm to private firms for duplication. the billing procedure would be amended, however. At the time at which an order is placed, the commission would indicate that the particular item be billed to the requester. The microfilm would be returned to the commission, and the bill examined to assure that the requester was not overcharged. Upon receipt of a check made out to the private firm, the commission would turn the copy over to the requester. As a final step, the check would be forwarded to the firm.

Appendix H

The proposed revision would accomplish the end desired by FEC. Because payment for report copies would be made by the requester to the contractor, it would not be necessary for FEC to charge its appropriation. Nor would requester payments have to be deposited in the treasury since the payments would not be for the use of the United States pursuant to 31 U.S.C. 484. We therefore have no legal objection to the proposal.

We note, however, that the task of handling, and thus being accountable for, requester payments might prove to be administratively burdensome. In our opinion, it is not necessary for FEC to monitor the price charged for each transaction so long as the price is regulated by contract. Therefore, there is no reason why requester payments may not be made directly to FEC's contractor and report copies transmitted directly to requesters by the contractor.

We have, for example, approved at least one other system which was proposed in order to accomplish essentially the same goals as the FEC's proposal. In b-166506, October 20, 1975, the environmental protection agency (epa) requested our views as to the propriety of a procedure similar to the one proposed by the FEC, the significant difference between the two being that EPA did not perform the administrative services which the FEC proposes to furnish.

According to the EPA submission, the agency had contracted with a number of private firms for the processing, storage, and retrieval of various types of data. For example, one contractor developed and printed film, and stored the negatives so that custom printing might be accomplished as

directed by EPA. Epa advised us that this information was available under the freedom of information act, and that it incurred considerable expense in satisfying requests from members of the public. These expenses were paid with funds appropriated to the agency, while any sums collected from requesters were deposited in the treasury as miscellaneous receipts pursuant to 31 U.S.C. 484.

EPA thus sought our approval of a system whereby it would advise requesting parties to deal directly with the private company which provided the agency with its information-handling services. EPA argued that when a contractor filled a request, the United States was not providing any services, and accordingly was not entitled to charge any fees when the entire transaction occur(red) solely between the requester and the firm holding the government contract.

We held that so long as the proposed procedures were not used to delay or deny access to information or otherwise circumvent the intent or specific provisions of the freedom of information act, 5 U.S.C. 552(a)(4), or the user charge statute, 31 U.S.C. 483a, we had no objection to the EPA proposal. We noted that although the foia provided for the promulgation by each agency of regulations specifying a uniform schedule of fees for the recovery of the direct costs of document search and duplication, neither that act nor any other statute authorized the United States to recover any of the costs associated with developing the information contained in the requested documents. We thus required that fpa assure, by including a provision to this effect in its agreement with its contractors, that the fees charged

requesters not exceed the fees which EPA itself would be authorized to charge if the agency provided the services directly. We further concluded that the contractors filling requests for information were acting independently, and not as agents of EPA, and that they were therefore entitled to retain any fees which they collected since these were not moneys received * * * for the use of the United States pursuant to 31 U.S.C. 484.

Thus, we would have no objection to a procedure, for example, in which the commission would confine itself to advising public requesters that they may deal directly with the private firms providing the duplication. Like the EPA, of course, the FEC would have to assure, in its agreement with its contractors, that the fees charged members of the public for copies not exceed the fees which the FEC would have been authorized to charge had it processed the request itself.

APPENDIX I — COOPERATIVE AGREEMENT NO. NCR-9218742

(Omitted here but printed separately as Lodging Appendix)

APPENDIX J — AFFIDAVIT OF HOWARD J. SARTORI, P.E. DATED OCTOBER 5, 1999

(Omitted here but printed separately as Lodging Appendix)

APPENDIX K — DECLARATION OF PROFFESSOR RICHARD B. CAPPALLI DATED MARCH 4, 1998

(Omitted here but printed separately as Lodging Appendix)